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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 156

LAWRENCE YEARSLEY AND GEORGE YEARSLEY,
PETITIONERS,

vs.

W. A. ROSS CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,353

AT LAW.

W. A. ROSS CONSTRUCTION COMPANY, A CORPORATION, APPELLANT,

vs.

LAWRENCE YEARSLEY AND GEORGE YEARSLEY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED NOVEMBER 5, 1938.

INDEX.

	Original	Print
Caption to Transcript from United States District Court	2	1
Praecipe for Transcript	3	2
Praecipe for Additional Transcript	5	3
Transcript from District Court of Otoe County, Nebraska	6	4
Summons and Sheriff's Return	6	4
Petition for Removal of cause to Federal Court	8	6
Order of Removal	10	8

	Original	Print
Motion of Plaintiff to remand cause to State Court	11	9
Order overruling Motion to remand	11	9
Amended Petition	12	10
Answer to Amended Petition	14	11
Motion of Plaintiff to strike portions of Answer	20	17
Order overruling Motion to strike portions of Answer	24	21
Reply	25	22
Amendment to Reply	26	23
Leave granted to amend Petition and Answer; Jury empaneled; Trial, May 18, 1938	27	23
Trial, May 19, 1938	27	24
Trial, May 20, 1938	28	24
Trial, May 24, 1938	28	24
Trial, May 25, 1938	28	24
Trial, May 26, 1938; Leave granted to amend Amended Petition, etc	29	25
Trial, May 27, 1938	29	25
Trial, May 28, 1938; Verdict	30	25
Judgment, June 6, 1938	31	26
Notice of Appeal and Acknowledgment of Service	32	27
Petition for Appeal	33	27
Assignment of Errors	34	28
Order allowing Appeal, etc	40	35
Bond on Appeal	41	36
Citation and Acknowledgment of Service	42	37
Order extending time to file Transcript	43	38
Order extending time to file Bill of Exceptions, and further extending time to file Transcript	44	39
Election as to printing of Transcript	45	39
Bill of Exceptions	46	40
Caption	46	40
Testimony for Plaintiffs	46	40
Lawrence Yearsley	46	40
Charles A. Shannon	51	45
Plaintiffs' Exhibit 1, Map or drawing showing location of Yearsley land and river, etc	53	47
Gordon H. Hamilton	56	51
M. A. Pauley	56	51
Alberta Yearsley	57	52
Alfred Wallen	57	53
Ed South	59	55
Motion of Defendant, W. A. Ross Construction Company, for directed verdict and overruling thereof	60	55
Testimony for Defendant, W. A. Ross Construction Company	60	55
Charles A. Shannon	60	55
Defendant's Exhibits	62	57
2, Drawing showing Yearsley land and west bank of Missouri River on June 24, 1933	62	57
3, Drawing of lots A and B in Section 30 lying immediately north of Section 31, in which Yearsley land is located	64	59
4, Map of Otoe County, Nebraska	66	61
5, Drawing of Yearsley land and showing location of river bank in various years	69	65

	Original	Print
Gordon H. Hamilton	71	68
Defendant's Exhibits	73	70
9, Contract between United States of America and W. A. Ross Construction Company, September 13, 1933	73	70
Excerpts from Specifications	77	77
10, Contract between United States of America and W. A. Ross Construction Company, July 11, 1935	83	86
Excerpts from Specifications	84	87
11, Letter, Theodore Wyman, Jr., to W. A. Ross Construction Company, September 28, 1933	85	88
12, Aerial Photographic Survey of Missouri River from Mile 600.7 to Mile 612.4	89	93
13, Drawings showing construction of dikes	92	97
15, Excerpt from letter of Herbert B. Loper to W. A. Ross Construction Company, July 7, 1936	97	102
14, Excerpt from letter of Herbert B. Loper to W. A. Ross Construction Company, September 12, 1936	97	103
16, Excerpt from letter of J. M. Young to W. A. Ross Construction Company, April 10, 1935	98	103
17, Excerpt from letter of J. M. Young to W. A. Ross Construction Company, October 11, 1934	98	103
19, Excerpt from letter of Herbert B. Loper to W. A. Ross Construction Company, June 3, 1937	98	104
21, Work Order authorizing extension of dike 601.9, etc.	99	104
22, Excerpt from letter of Herbert B. Loper to W. A. Ross Construction Company, September 22, 1937	99	106
23, Map of Missouri River from Copeland to Otoe Bends.	101	107
24, Excerpt from letter of Herbert B. Loper to W. A. Ross Construction Company, April 9, 1937	102	108
25, Excerpt from letter of Herbert B. Loper to W. A. Ross Construction Company, May 7, 1937	102	108
Arthur W. Kendall	105	111
Defendant's Exhibit 7, Map of Missouri River from Copeland to Otoe Bends	107	113
B. E. Dodds	108	116
Defendant's Exhibit 28, Record of area cleared and trees cut down, etc.	109	116
Herbert B. Loper	112	119
Charles C. Cook	117	125
Val Crume	121	129
Gene Thayer	122	130
Fred Oetgen	123	132
Harry Willhoft	124	132
Plaintiffs' Exhibit 31, Photograph showing stake, brush and trees close to north Yearsley fence line	127	135
Geo. M. Lathrop	128	136
Claude C. Votapka	130	138
Hugh R. Maxwell	132	140
Edward O'Rourke	134	143
Arlie J. Gregory	137	146
Dale Henry	140	149
Laurence H. Hart	142	151
Earl M. Walker	143	152

	Original	Print
R. L. Hale	144	153
Defendant's Exhibits 47 to 50, Photographs showing river bank along Yearsley property	146	155
Paul Jessen	147	157
Motion of Plaintiffs to amend Petition by interlineation and objection thereto	148	158
Testimony for Plaintiffs in rebuttal	148	159
Lawrence Yearsley	148	159
Plaintiffs' Exhibit 32, Photograph taken 100 yards south of north property line of Yearsley land	150	160
Motions of Defendant, W. A. Ross Construction Company for directed verdict and overruling thereof	151	161
Recital of sustaining of Motion of Plaintiff to amend Petition	152	162
Instructions to Jury requested by Defendant, W. A. Ross Construction Company, and overruling thereof	153	164
Court's Instructions to the Jury	154	166
Verdict	160	176
Judgment	161	177
Approval of Bill of Exceptions by District Judge and Counsel for Plaintiffs	161	177
Clerk's Certificate to Transcript	162	178
Proceedings in U. S. Circuit Court of Appeals	179	179
Appearance of Counsel for Appellant	179	179
Appearance of Mr. Robert Van Pelt as Counsel for Appellees	179	179
Appearance of Messrs. Dwyer & Dwyer as Counsel for Appellees	180	179
Order of Submission	180	180
Opinion, U. S. Circuit Court of Appeals	181	180
Judgment, U. S. Circuit Court of Appeals	188	186
Petition of Appellees for a Rehearing	189	187
Order Denying Petition for Rehearing	190	188
Motion of Appellee Lawrence Yearsley for stay of Mandate	190	188
Order Staying Issuance of Mandate	191	189
Clerk's Certificate to Transcript	192	189
Order allowing certiorari		190

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1939 of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest: E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the fifth day of November, A. D. 1938, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the W. A. Ross Construction Company, a corporation, was Appellant, and Lawrence Yearsley and George Yearsley were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 2] In the District Court of the United States for the District of Nebraska, Lincoln Division.

Lawrence Yearsley and George Yearsley, Plaintiff,
No. 1065. vs. Law.
W. A. Ross Construction Company, a Corporation, and A. M. Stephenson, Defendants.

Plea, before Honorable Thomas C. Munger, Judge of the District Court of the United States, in and for the District of Nebraska, within the Eighth Judicial Circuit, at the May 1938 Term of said Lincoln Division, begun on the 9th day of May, 1938, and held at the United States Court House in the City of Lincoln, within said Lincoln Division of the District of Nebraska.

Appearances.

For Appellees: Dwyer & Dwyer, Plattsmouth, Nebraska. Perry, VanPelt & Marti, Lincoln, Nebraska.

For Appellant: Paul Jessen, Nebraska City, Nebraska. John M. Dierks, Nebraska City, Nebraska. Clay C. Rogers, Kansas City, Missouri.

Be It Remembered, That at a District Court of the United States for the District of Nebraska, Lincoln Division, held at the United States Court House in the City of Lincoln, in the District and Division aforesaid, at the May 1938 Term, there being present and presiding Honorable Thomas C. Munger, United States District Judge in and for the District of Nebraska, proceedings were had and done in the respective days hereinafter mentioned in the matter of Lawrence Yearsley and George Yearsley, Plaintiffs, versus W. A. Ross Construction Company, a Corporation, and A. M. Stephenson, Defendants, that is to say:

[fol. 3] Praecipe for Transcript.

Filed: October 15, 1938.

To the Clerk of the District Court of the United States for the District of Nebraska, Lincoln Division:

Please prepare transcript for appeal to the Circuit Court of Appeals, Eighth Circuit, in the above entitled cause and include therein the following:

1. All record entries by the Court in this case in this Court subsequent to the filing of the amended petition of plaintiffs, Lawrence Yearsley and George Yearsley.

2. Amended petition of Lawrence Yearsley and George Yearsley, plaintiffs, filed on December 23, 1937.

3. Separate answer of defendant, Ross Construction Company, to said amended petition.

4. Plaintiffs' motion to strike from defendant's separate answer.

5. Order of Court overruling plaintiffs' motion to strike.

6. Plaintiffs' reply to separate answer of defendant, Ross Construction Company, and amendment to plaintiffs' said reply.

7. Defendant's separate motion for directed verdict at conclusion of plaintiffs' evidence. (Note: This motion is included in the Bill of Exceptions, and is found on Page 15 thereof.)

8. Defendant's four separate motions for directed verdict at conclusion of all the evidence. (Note: These four motions are included in the Bill of Exceptions, and are found on Pages 106 and 107 thereof.)

9. Verdict of the jury.

10. Judgment of the Court on jury's verdict.

11. Defendant's Bill of Exceptions and order allowing same.

12. Assignment of errors.

13. Petition for Appeal.

14. Notice of Appeal.

15. Order allowing Appeal.

[fol. 4] 16. Appeal Bond.

17. Citation.

18. Order extending time for filing transcript and appearance date for plaintiffs in Circuit Court of Appeals.

19. Order extending time to November 5, 1938 for filing Bill of Exceptions and docketing appeal.

20. Election as to printing of record.

21. This praecipe with proof of service thereon.

W. A. ROSS CONSTRUCTION COMPANY, a corporation,
Defendant and Appellant.
By Clay C. Rogers,
Paul Jessen and
John M. Dierks, Its Attorneys.

Service of the foregoing praecipe and receipt of a copy thereof is hereby acknowledged this 15 day of October, 1938.

W. L. DWYER,
ROBERT VANPELT,
Attorneys for Plaintiffs and Appellees.

[fol. 5] Praecipe for Supplement to Transcript.

Filed: October 22, 1938.

To the Clerk of the District Court of the United States for the District of Nebraska, Lincoln Division:

Please prepare and include in the transcript for appeal to the Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, the following additional entries not specified in the original praecipe for transcript filed herein:

1. Summons issued by the Clerk of the District Court of Otoe County, Nebraska and Sheriff's return thereon.

2. Petition for removal to the District Court of the United States for the District of Nebraska, Lincoln Division, filed July 21, 1937.

3. Order of removal filed in the District Court of Otoe County, Nebraska, on July 21, 1937.

4. Motion of plaintiff to remand.

5. Journal entry or order of Court overruling motion to remand.

6. This praecipe for supplement to transcript with proof of service thereon.

W. A. ROSS CONSTRUCTION COMPANY, a corporation,
Defendant and Appellant,
By Clay C. Rogers,
Paul Jessen and
John M. Dierks,
Its Attorneys.

Service of the foregoing praecipe for supplement to transcript and receipt of a copy thereof is hereby acknowledged this 22 day of October, 1938.

W. L. DWYER &
ROBERT VAN PELT,
Attorneys for Plaintiff and Appellees.

[fol. 6] Summons.

(Included in Transcript on Removal, Filed: July 30, 1937)

Summons—District Court—Original.

In the District Court of Otoe County, Nebraska.

Lawrence Yearsley,
vs.
Ross Construction Company, a corporation.

No. 12293 Docket 11 Page 293

State of Nebraska,
Otoe County—ss.

The State of Nebraska, to the Sheriff of said County—Greeting:

You Are Hereby Commanded To Notify Ross Construction Company, a Corporation, Defendant, that it has been sued by Lawrence Yearsley, Plaintiff, in the District Court of the Second Judicial District of the State of Nebraska, within and for said County of Otoe, and that unless it answer by the 28th day of June, A. D. 1937, the petition of said Lawrence Yearsley, Plaintiff, filed against it, in the Clerk's office of said Court, such petition will be taken as true, and judgment rendered accordingly.

The Sheriff will make due return of this Summons on or before the 7th day of June, A. D. 1937.

Witness my hand and the Seal of said Court at Nebraska City, this 27th day of May, A. D. 1937.

JOHN C. MILLER,
Clerk.

(Seal)

Endorsement.

Plaintiff prays damages in the sum of $5000.00 with interest and costs of suit.

Attest:
John C. Miller, Clerk.

D. O. DWYER and
W. L. DWYER,
Plaintiff's Attorneys.

[fol. 7] State of Nebraska,
Otoe County—ss.

Received this Summons on the 27th day of May, 1937. I certify that on the 28th day of May, 1937, I served the same on the above named Ross Construction Company, a corporation, by delivering to and leaving with Leonard Roth, [bookeeper] for said corporation in said county, personally, a true and certified copy hereof, with all endorsements thereon, as required by law. Done in Otoe County, Nebraska. (No president, mayor, chairman of the board of directors or trustees or other chief officers of said corporation are found in Otoe County, Nebr.)

CARL RYDER, Sheriff,
By Howard Zimmers,
Deputy.

Fees:

Service and Return	$ .50
Copy	.25
Mileage	1.60
Total	$2.35

Endorsed—Dist. Court, Otoe County, Neb. Filed May 29, 1937. John C. Miller, Clerk, No. 12293.

[fol. 8] Petition For Removal to District Court of the United States For the District of Nebraska, Lincoln Division.

Filed July 21, 1937.

(Included in Transcript on Removal, Filed: July 30, 1937.)

In the District Court of Otoe County, Nebraska.

Lawrence Yearsley, Plaintiff,
No. 12,293. vs.
Ross Construction Company, a corporation, Defendant.

Comes now your petitioner, Ross Construction Company, a corporation, and shows and makes known to the Court that it is the defendant in the above entitled action; that the matter in dispute herein exceeds, exclusive of interests and costs, the sum or value of $3,000.00; that said suit is of a civil nature and is an action brought by plaintiff against your petitioner as defendant.

[Yours] petitioner further alleges that in the above entitled suit there is a controversy which is wholly between citizens of different states, to-wit: a controversy between your petitioner, Ross Construction Company, a corporation, which your petitioner alleges was at the time of the commencement of this suit, ever since has been, and still is, a citizen and resident of the State of Missouri and is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its principal place of business at Kansas City, Missouri, and the said plaintiff, Lawrence Yearsley, who your petitioner alleges was at the time of the commencement of this suit, ever since has been, and still is, a citizen and resident of the State of Nebraska, and that your petitioner was not, at the time

of the commencement of this action, nor since has been, and is not now, a citizen or resident of the State of Nebraska.

Your petitioner offers herewith a bond, with good and sufficient surety, for its entering in the District Court of the United States for the District of Nebraska, Lincoln Division, within thirty days from the date of filing of this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said District Court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further alleges that the amended petition of plaintiff was filed herein on July 14, 1937 and that under the laws of the State of Nebraska your petitioner is [fol. 9] not required to answer or plead to said amended petition before the third Monday thereafter, and such time has not yet expired and defendant is entitled to make and file its petition for removal of said suit to said District Court of the United States.

Wherefore, your petitioner prays that this Court proceed no further herein, except to make an order for removal and to accept said surety and bond, and to cause the record herein to be removed to said District Court of the United States for the District of Nebraska, Lincoln Division.

ROSS CONSTRUCTION COMPANY,
A Corporation, Defendant,
By Jessen & Dierks, Its Attorneys.

State of Nebraska,
County of Otoe.—ss.:

John M. Dierks, being first duly sworn on his oath, says that he is one of the attorneys for Ross Construction Company, a corporation, defendant in the above entitled action; that he has read the foregoing petition, knows the contents thereof and the statements therein contained are true as he verily believes.

JOHN M. DIERKS.

Subscribed in my presence and sworn to before me this 21st day of July, 1937.

(Seal) JOHN C. MILLER,
Notary Public.

My com. Expires: July 10, 1943.

Endorsed—Dist. Court, Otoe County, Neb. Filed Jul. 21, 1937. John C. Miller, Clerk. No. 12293.

[fol. 10] Order of Removal.

(Included in Transcript on Removal, Filed: July 30, 1937.)

In the District Court of Otoe County, Nebraska.

Lawrence Yearsley, Plaintiff,
No. 12,293. vs.
Ross Construction Company, a corporation, Defendant.

Now on this 21st day of July, 1937 this cause came on for hearing upon the petition of Ross Construction Company, a corporation, for the removal of this cause to the District Court of the United States for the District of Nebraska, Lincoln Division, the evidence and the record in this proceeding, and was submitted to the Court, upon consideration whereof the Court finds that written notice of said petition and bond for removal has been given to plaintiff prior to filing the same and that the allegations contained in said petition for removal are true; that said petition for and bond on removal should be accepted; that said cause should be removed to said District Court of the United States and this Court should proceed no further in said suit.

It Is, Therefore, Considered, Ordered and Adjudged that said petition for and bond on removal be accepted; that said petition for removal be granted and that all other proceedings of this Court in said suit be stayed; that said cause be removed from this Court to the District Court of the United States for the District of Nebraska, Lincoln Division and the Clerk of this Court is hereby ordered and directed to forthwith prepare in the manner required by law a certified copy of the record of all proceedings had in

said suit in this Court for filing in said District Court of the United States.

By the Court,

W. W. WILSON,
District Judge.

Endorsed—Dist. Court, Otoe County, Neb. Filed Jul. 21, 1937. John C. Miller, Clerk, No. 12,293.

[fol. 11] (Motion of Plaintiff to Remand Cause to State Court.)

Filed: August 3, 1937.

Comes now the plaintiff, Lawrence Yearsley, and moves the court to remand this cause to the District Court of Otoe County, Nebraska and as grounds for such motion sets down and assigns the following, to-wit:

1. The original petition filed by the plaintiff against the defendant sought damages in the sum of $5,000.00 and disclosed a [removeable] action to this Court.

2. On the date when defendant was required to answer or otherwise plead to said petition, it filed in the District Court of Otoe County, Nebraska, a motion to require plaintiff to make his petition more definite and certain in the particulars enumerated in said motion, and the petition for removal was not filed within the time required by statute.

LAWRENCE YEARSLEY,
Plaintiff.

By D. O. Dwyer,
W. L. Dwyer,
His Attorneys.

(Order Overruling Motion to Remand Cause to State Court.)

Entered: October 21, 1937.

It Is Here Ordered, That plaintiff's motion to remand the above entitled cause be, and the same is hereby, overruled, to which ruling of the Court, exceptions are allowed.

[fol. 12] Amended Petition.

Filed: December 23, 1937.

Come now the plaintiffs and for cause of action against the defendants, allege:

(1) That the defendant Ross Construction Company is a corporation engaged in the general construction of roads and bridges, with its principal place of business or office, in Kansas City, Missouri, and is a non-resident of the State of Nebraska and a citizen and resident of the State of Missouri.

(2) That the plaintiffs are, and have at all times mentioned herein, been citizens and residents of Otoe County, Nebraska, and are the owners of an undivided two-thirds interest in and to two hundred fifty (250) acres of land and accretions thereto the Missouri river, in Section 31, Township 8, Range 15, in Otoe County, Nebraska, and the defendant A. M. Stephenson is a citizen and resident of Otoe County, Nebraska, and is the owner of the remaining undivided one-third interest in said real estate; that said defendant A. M. Stephenson has refused to join with the plaintiffs in this action and is therefore made a party defendant as he is jointly interested in the matters and things hereinafter complained of.

(3) That during a period of about three years last past, the defendant, Ross Construction Company, a corporation, as aforesaid, has been engaged in construction work on the Missouri river, changing the course of said river, and during said period of time has built dykes in said river and used large boats with paddles and pumps to produce artificial erosion to wash away land along said Missouri river banks and in so doing has washed and taken from plaintiffs' said farm, up to this date, one hundred (100) acres, more or 'ess, of good pasture land, of the value of $50.00 per acre.

(4) That during the month of July, 1937, by reason and because of the large dykes built by defendant Ross Construction Company, a corporation, in the Missouri River as aforesaid, in close proximity to plaintiffs' farm lands, the waters of said river were cast upon and caused to wash over forty acres, more or less, of blue grass pasture, depositing mud and sand over the entire forty acres of a

depth from four inches in places to three feet, completely [fol. 13] destroying the blue grass thereon and damaging said land in the sum of $75.00 per acre.

(5) Plaintiffs further allege that the said defendant, Ross Construction Company by and through its servants, agents and employees, have gone upon plaintiffs' farm lands and trespassed thereon by cutting trees and brush, all to plaintiffs' damage in the sum of $2000.

Wherefore, plaintiffs pray that they have and recover of the defendant, Ross Construction Company, a corporation, the sum of $8,000.00 damages, together with interest and costs.

LAWRENCE YEARSLEY, and
GEORGE YEARSLEY,
Plaintiffs,

By D. O. Dwyer,
W. L. Dwyer,
Their Attorneys.

State of Nebraska,
Cass County.—ss.:

Lawrence Yearsley, Plaintiff, being sworn on oath, says that he has read over the foregoing amended petition, and that the facts therein alleged are true, as he verily believes.

LAWRENCE YEARSLEY.

Subscribed in my presence and sworn to before me this 19 day of November, 1937.

(Notarial Seal)

W. L. DWYER,
Notary Public.

[fol. 14] Separate Answer of Defendant, Ross Construction Company, a Corporation, to Amended Petition.

Filed: January 28, 1938.

Comes now the defendant, Ross Construction Company, a corporation, whose true and correct corporate name is W. A. Ross Construction Company, a corporation, and for its separate answer to the amended petition of plaintiffs filed herein admits, denies and alleges as follows:

1. This answering defendant specifically admits the allegations of Paragraph 1 of said amended petition and further specifically admits the allegations of Paragraph 2 of said amended petition, except the allegation as to the total number of acres of land in Section Thirty-one (31), Township Eight (8), Range Fifteen (15), in Otoe County, Nebraska owned by the plaintiffs and the defendant, A. M. Stephenson, and concerning said allegation of total acreage of land this answering defendant alleges that it is without knowledge as to the total acreage of land owned by said plaintiffs and said defendant, A. M. Stephenson, in said Section Thirty-one (31) and, therefore, specifically denies the allegation as to the total acreage of said land.

Amendment to Paragraph 1 by leave of Court:

That since the commencement of this action and since the filing of the separate answer of defendant, Ross Construction Company, herein, the plaintiffs and defendant, A. M. Stephenson, have sold and conveyed the above described premises and are no longer the owners thereof.

2. Further answering the allegations of Paragraph 3 of said amended petition this answering defendant specifically admits that it has been engaged in construction work on the Missouri River for more than three years last past and during said period of time has built dikes in said river, but specifically denies that it has by such construction work washed or taken from said land 100 acres or any part thereof, produced artificial erosion or changed the course of said river, except to confine it between [stablized] bank lines as set and defined officially by Government engineers in charge of the work for the Government of the United States.

3. Further answering the allegations of Paragraph 4 [fol. 15] of said amended petition this answering defendant specifically denies that it has cast the waters of said river upon said lands or deposited mud or sand upon any of said land or destroyed any blue grass thereon by reason of its construction work and the building of dikes in said Missouri River.

4. Further answering Paragraph 5 of said amended petition this answering defendant specifically denies that it

or its servants, agents or employees have trespassed upon said land by cutting trees and brush, setting stakes and making surveys on said land and further specifically denies that it is threatening to continue by artificial erosion to wash away any of said lands, or to flood said lands by reason of the building of dikes in said river, or that it will irreparably damage and destroy said lands by reason of said construction work or the building of dikes in said river.

5. Further answering Paragraphs 3 and 4 of said amended petition this answering defendant specifically denies the allegations of plaintiffs concerning the value of the land alleged to have been damaged, destroyed or taken.

6. Further answering said amended petition this answering defendant alleges that on January 21, 1927 Chapter 47, Laws of the Second Session of the 69th Congress of the United States of America was duly enacted and approved and by the terms of said act the Congress of the United States of America adopted among certain works of public improvement which were authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, the improvement of the Missouri River, between Kansas City, Missouri, from the upper end of Quindaro Bend and Sioux City, Iowa, in accordance with the report of the Board of Engineers for rivers and harbors submitted in House document 1120, 60th Congress Second Session, with a view to securing a permanent navigable channel six feet in depth, and to conform to the character and methods of improvement of said river, now defined and proceeding under existing law, on the reach between the point first named and the mouth thereof; that pursuant to said act of Congress and report of the Board of Engineers for rivers and harbors, this answering defendant entered into two written contracts with [fol. 16] the United States of America dated September 13, 1933 and July 11, 1935 respectively, for the construction of a part of the work of public improvement on said Missouri River authorized by said act of Congress; that said written contracts provide the nature, kind and quantity of construction work to be performed by this answering defendant and the specifications under which said work

was to be done and the place where each item of construction work was to be located, and the manner, method and procedure of doing said work; that said written contracts and specifications were prepared by the United States Government and consist of about 95 typewritten pages and it would, therefore, unduly encumber this record to attach copies thereof to this answer; That said contracts are on file in the Government engineers office in Omaha, Nebraska and are open to inspection and if required this answering defendant will furnish to plaintiffs copies of said contracts.

7. Further answering said amended petition this answering defendant alleges that all of the construction work done by it in or adjacent to said Missouri River in the proximity of the lands of said plaintiffs and said defendant, A. M. Stephenson, has been done pursuant to said contracts with the Government of the United States of America and in the performance of such construction work and operations it has acted as an agent and instrumentality of the Government of the United States of America; that all of said work has been performed under the direction of the Secretary of War of the United States of America and under the supervision of the Chief of Engineers of the War Department of the United States of America and in strict accordance with said written contracts and specifications, for the purpose set forth in said act of Congress as a work of public improvement to secure a permanent navigable channel six feet in depth in said Missouri River between Kansas City, from the upper end of Quindaro Bend, and Sioux City, Iowa.

8. Further answering said amended petition this answering defendant alleges that the portion of the land belonging to plaintiffs and said defendant, A. M. Stephenson, which is alleged to have been or will be damaged and destroyed by the construction work and operations of this defendant, is located along the west bank of said Missouri River at a point about five miles southeast of the city of [fol. 17] Nebraska City, Nebraska and lies below the high water line of the west bank of said river, and is composed entirely of sand bar accretions, on which the principal vegetation consists of willows and rushes; that such portion of said premises involved in this action is so situated

that it has continually been subject to overflow from the waters of said Missouri River for many years prior to any construction work that was done by this defendant pursuant to the above mentioned contracts; that any damage to or destruction of said premises has resulted from natural causes by reason of the location of said premises and consist entirely of indirect and consequential damages resulting from the above mentioned works of public improvement of said Missouri River for navigation pursuant to the above mentioned act of Congress authorizing the same, and there is no liability on the part of this defendant as an agent or instrumentality of the United States of America in performing said construction work for such alleged damage sustained by plaintiffs.

9. Further answering said amended petition this answering defendant alleges that to complete and carry out said above mentioned contracts there is still to be constructed dikes and revetment work along the west bank of said Missouri River for the purpose of permanently stabilizing said bank, a portion of which work will be on the bank and in the river adjacent to and upon the premises involved in this action; that in order to locate said additional construction work it was necessary for the Government engineers to clear some willows and brush on a portion of the land involved in this action adjacent to the river and to set stakes on said premises locating the line of said additional construction work; that all such preliminary work of making surveys, setting stakes, clearing trees, brush or willows that has taken place on any portion of the premises involved in this action, has been done under the direction of the Area Engineer of the United States of America in charge of said project and by persons employed by him for that purpose, and none of such work has been done by any agents, servants or employees of this answering defendant; that the above mentioned work done by and under the direction of said Area Engineer and the further construction work which it will be necessary for this answering defendant to perform by construction of the above mentioned revetment and pile dikes to complete said contracts, will constitute an essential part of the entire project of public works for improvement of navigation [fol. 18] on said Missouri River, and the damage or de-

struction of property, if any, belonging to said plaintiffs and said defendant, A. M. Stephenson, resulting from said additional construction work would likewise be an indirect and consequential damage, to which said premises would be subject without liability on the part of this answering defendant in the paramount interests of the completion of said work of public improvement; that if the completion of said construction work by this answering defendant under said contracts is interfered with or enjoined it will disrupt the whole scheme or plan of the United States of America in the work of public improvement of said Missouri River for navigation and will render the vast amount of improvement work heretofore completed and contemplated under said act of Congress wholly ineffective and of little value; and plaintiffs, therefore, are not entitled to enjoin this answering defendant from the completion of said additional construction work above mentioned in the performance of its contracts with the United States of America.

Wherefore, this answering defendant prays that plaintiff's amended petition be dismissed; that the restraining order heretofore issued by the District Court of Otoe County, Nebraska on July 14, 1937 be dissolved; that both a temporary and permanent injunction against further construction work by this answering defendant in the performance of its contracts with the United States of America be denied, and that it go hence without day and recover its costs herein incurred and expended.

W. A. ROSS CONSTRUCTION COMPANY, a corporation,
Defendant,

By Jessen & Dierks,
Nebraska City, Nebraska, and
Clay C. Rogers, Its Attorneys.
904 Bryant Building,
Kansas City, Missouri.

State of Nebraska,
County of Otoe—ss.

John M. Dierks, being first duly sworn on his oath, says that he is one of the attorneys for W. A. Ross Construction Company, a corporation, defendant in the above en-

[fol. 19] titled action; that he makes this verification as such attorney for said corporation; that he has read the foregoing separate answer, and to the best of his knowledge, information and belief there is good ground to support it and it is not interposed for delay.

JOHN M. DIERKS.

Subscribed in my presence and sworn to before me this 27" day of January, 1938.

O. J. SCHNEIDER,
(Notarial Seal) Notary Public.

My com. Expires: January 27-1938.

[fol. 20] (Motion of Plaintiffs to Strike Portions of Answer.)

Filed: April 4, 1938.

Come now the plaintiffs and each separate and severally move the court as follows:

1. To strike from the answer of the defendant W. A. Ross Construction Company, a corporation, Paragraph 6 of said answer in words and figures following, to-wit:

"Further answering said amended petition this answering defendant alleges that on January 21, 1927 Chapter 47, Laws of the Second Session of the 69th Congress of the United States of America was duly enacted and approved and by the terms of said act the Congress of the United States of America adopted among certain works of public improvements which were authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, the improvement of the Missouri river, between Kansas City, Missouri, from the upper end of Quindaro Bend and Sioux City, Iowa, in accordance with the report of the Board of Engineers for rivers and harbors submitted in House Document 1120, 60th Congress Second Session, with a view to securing a permanent navigable channel six feet in depth, and to conform to the character and methods of improvement of said river, now defined and proceeding under existing law, on the

reach between the first point named and the mouth thereof; that pursuant to said act of Congress and report of the Board of Engineers for rivers and harbors, this answering defendant entered into two written contracts with the United States of America dated September 13, 1933 and July 11, 1935, respectively, for the construction of a part of the work of public improvement on said Missouri River authorized by said act of Congress; that said written contracts provide the nature, kind and quantity of construction work to be performed by this answering defendant and the specifications under which said work was to be done and the place where each item of construction work was to be located, and the manner, method and procedure of doing said work; that said written contracts and specifications were prepared by the United States Government and consist of about 95 typewritten pages and it would, therefore, unduly encumber this record to attach copies thereof to this answer; that said contracts are on file in the Government Engineers office in Omaha, Nebraska and are open to inspection and if required this defendant will furnish to plaintiffs copies of said contracts."

For the reason that same is irrelevant, redundant and surplusage and states no defense to plaintiff's cause of action.

2. To strike from the answer of the said defendant W. A. Ross Construction Company, a corporation, paragraph 7 thereof, in words and figures as follows, to-wit:

[fol. 21] "Further answering said amended petition this answering defendant alleges that all of the construction work done by it in or adjacent to said Missouri river in the proximity of the lands of said plaintiffs and said defendant, A. M. Stephenson, has been done pursuant to said contracts with the Government of the United States of America and in the performance of such construction work and operations it has acted as an agent and instrumentality of the Government of the United States of America; that all of said work has been performed under the direction of the Secretary of War of the United States of America and in strict accordance with said written contracts and specifications, for the purpose set forth in said act of congress as a work of public improvement to secure a permanent navigable channel six feet in depth in said Missouri River be-

tween Kansas City, from the upper end of Quindaro Bend and Sioux City, Iowa."

For the reason that same is redundant, irrelevant and surplusage and states no defense to plaintiff's cause of action.

3. To strike from the separate answer of the said defendant, W. A. Ross Construction Company, a corporation, the following lines and parts of lines, from Paragraph 8, to-wit:

"pursuant to the above mentioned act of Congress authorizing the same, and there is no liability on the part of this defendant as an agent or instrumentality of the United States of America in performing said construction work for such alleged damage sustained by plaintiffs."

For the reason that same is irrelevant, redundant and surplusage, states no defense to plaintiffs' cause of action, and is a mere conclusion of law.

4. To strike from said separate answer of said defendant, paragraph 9 thereof, in words following, to-wit:

"Further answering said amended petition this answering defendant alleges that to complete and carry out said above mentioned contracts there is still to be constructed dikes and revetment work along the west bank of said Missouri river for the purpose of permanently stabilizing said bank, a portion of which work will be on the bank and in the river adjacent to and upon the premises involved in this action; that in order to locate said additional construction work it was necessary for the Government engineers to clear some willows and brush on a portion of the land involved in this action adjacent to the river and to set stakes on said premises locating the line of said additional construction work; that all such preliminary work of making surveys, setting stakes, clearing trees, brush and willows that has taken place on any portion of the premises involved in this action, has been done under the direction of the Area Engineer of the United States of America in charge of said project and by persons employed by him for that purpose, and none of such work has been done by any agents, servants or employees of this answering defendant; that the above mentioned work done by and under the direction of said Area Engineer and the further construction

[fol. 22] work which it will be necessary for this answering defendant to perform by construction of the above mentioned revetment and pile dikes to complete said contracts, will constitute an essential part of the entire project of public works for improvement of navigation on said Missouri River, and the damage or destruction of property if any, belonging to the said plaintiffs and said defendant A. M. Stephenson, resulting from said additional construction work would likewise be an indirect and consequential damage to which said premises would be subject without liability on the part of this answering defendant in the [paramoung] interests of the completion of said work of public improvement; that if the completion of said construction work by this answering defendant under said contract is [interferred] with or enjoined it will disrupt the whole scheme or plan of the United States of America in the work of public improvement of said Missouri River for navigation and will render the vast amount of improvement work heretofore completed and contemplated under said act of Congress wholly ineffective and of little value; and plaintiffs, therefore, are not entitled to enjoin this answering defendant from the completion of said additional construction work above mentioned in the performance of its contract with the United States of America."

For the reason that same is redundant, irrelevant and surplusage. and states no defense to plaintiffs' cause of action.

5. In the alternative, if the foregoing paragraph 4 of this motion is overruled, plaintiffs move the court to strike from said paragraph 9 of said answer, the following, to-wit:

"Further answering said amended petition, this answering defendant alleges that to complete and carry out said above mentioned contracts there is still to be constructed dikes and revetment work along the west bank of said Missouri River for the purpose of permanently stabilizing said bank, a portion of which work will be on the bank and in the river adjacent to and upon the premises involved in this action; * * * * that the above mentioned work done by and under the direction of said Area Engineer and the further construction work which it will be necessary for this answering defendant to perform by construction of the above men-

tioned revetment and pile dikes to complete said contracts, will constitute an essential part of the entire project of public works for improvement of navigation on said Missouri River, and the damage or destruction of property, if any, belonging to said plaintiffs and said defendant, A. M. Stephenson, resulting from said additional construction work would likewise be an indirect and consequential damage, to which said premises would be subject without liability on the part of this answering defendant in the paramount interests of the completion of said work of public improvement; that if the completion of said construction work by this answering defendant under said contract is [interferred] with or enjoined it will disrupt the whole scheme or plan of the United States of America in the work of public improvement of said Missouri River for navigation and will render the vast amount of improvement work heretofore completed and contemplated under said act of Congress wholly ineffective and of little value; and plaintiffs, therefore, are not entitled to enjoin this answering defendant from the completion of said additional construction work above mentioned in the performance of its contracts with the United States of America."

[fol. 23] For the reason that same is redundant, irrelevant and surplusage and states no defense to plaintiffs' cause of action.

LAWRENCE YEARSLEY and
GEORGE YEARSLEY,
Plaintiffs,
By Perry, Van Pelt & Marti,
D. O. Dwyer & W. L. Dwyer,
Their Attorneys.

[fol. 24] (Order Overruling Motion to Strike Portions of Answer.)

Entered: May 6, 1938.

It Is Here Ordered, That plaintiffs' motion to strike part of defendant's Answer, heretofore filed, be, and the same is hereby overruled, to which ruling of the Court, exception is allowed.

[fol. 25] Reply.

Filed: May 17, 1938.

Come now the plaintiffs and for reply to the separate answer of the defendant, W. A. Ross Construction Company, admit, deny and allege as follows:

1. Admit that the said defendant is operating under a contract with the United States of America, as alleged in paragraph 6 of said answer and in this connection, plaintiffs allege that said contract with the said United States of America, does not contemplate the taking of plaintiffs' property without just compensation and without due process of law, and further, that the acts of said defendant in so destroying plaintiffs' land and destroying their blue grass pasture, infringes their constitutional rights as secured to them under the Fifth Amendment to the Constitution of the United States.

2. For further reply, plaintiffs deny each and every [allegagtion] in said answer contained not herein specifically admitted or otherwise replied to; and except such as are admissions of the allegations of plaintiffs' petition.

Wherefore, plaintiffs pray judgment as in their petition prayed for.

LAWRENCE YEARSLEY, ET AL.,
Plaintiffs,

By Perry, Van Pelt & Marti,
D. O. Dwyer & W. L. Dwyer,
Their Attorneys.

State of Nebraska,
Cass County.—ss.:

Lawrence Yearsley, one of the plaintiffs being first duly sworn says that he has read over the foregoing reply and that the facts therein stated are true as he verily believes.

LAWRENCE YEARSLEY.

Subscribed in my presence and sworn to before me this 16th day of May, 1938.

(Notarial Seal) DOROTHY ELLIOTT,
4-3-43. Notary Public.

[fol. 26] **Amendment To Reply.**

(By Leave of Court)

Filed: May 26, 1938.

Plaintiff for further reply admits that since the commencement of this action, and since the filing of the answer of defendant Ross Construction Company, plaintiffs and A. M. Stephenson have sold and conveyed the premises described in plaintiffs' petition; and alleges that said premises were sold and conveyed to Paul Jessen, one of the attorneys for defendant construction company, and that the contract of sale provided that the said Lawrence Yearsley reserved the right to prosecute the action pending in the said court at Lincoln, Nebraska, against Ross Construction Company in which this reply is filed.

[fol. 27] **Leave to Amend Petition By Interlineation—Leave To Amend Paragraph One of Answer Instanter—Cause Called For Trial—Jury Empaneled and Sworn—Trial Proceeds.**

Entered: May 18, 1938.

Upon application of the plaintiff, and for cause shown, leave is given to amend petition by interlineation, instanter, and the defendant is given leave to amend the first paragraph of its Answer instanter.

Thereupon, the cause is called for trial, the plaintiffs, Lawrence Yearsley and George Yearsley, appearing by their attorneys Mrs. W. L. Dwyer and Robert Van Pelt, and the defendant Ross Construction Company, by its attorneys, Jessen & Dierks, and Clay C. Rogers; also come the following named persons as jurors to try said cause, to-wit:

George A. Dunham	Oscar Bodine	Frank Koudele
J. I. Hunley	Douglas Brown	Emory C. Riecker
Charles Divis	Emor Ballow	Frank Hendershot
G. R. Nordstrom	Charles Hunt	Leo Gorman

who are duly empaneled and sworn to try said cause. Opening statements are made by the respective counsel, testimony is adduced, and at the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are

continued until Thursday, May 19, 1938, at nine o'clock and thirty minutes before noon.

(Trial, May 19, 1938.)

Entered: May 19, 1938.

On this day again come the parties herein, with their respective counsel; also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds. Further testimony is adduced, and at the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are continued until 9:30 A. M., on Friday, May 20, 1938.

[fol. 28] Trial Proceeds.

Entered: May 20, 1938.

On this day again come the parties herein, by their respective counsel; also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds. Further testimony is adduced, and at the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are continued until nine o'clock and forty-five minutes before noon, on Tuesday, May 24, 1938.

Trial Proceeds.

Entered: May 24, 1938.

On this day again come the parties herein, by their respective counsel; also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds. Further testimony is adduced, and at the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are continued until 9:30 A. M., on Wednesday, May 25, 1938.

Trial Proceeds.

Entered: May 25, 1938.

On this day again come the parties herein, by their respective counsel; also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds. Fur-

ther testimony is adduced, and at the hour of five o'clock P. M., the trial not being concluded, further proceedings herein are continued until 9:30 A. M., on Thursday, May 26, 1938.

[fol. 29] Trial Proceeds—At Close of Evidence, Leave To Amend Amended Petition By Interlineation—Default of A. M. Stephenson For Want of Pleadings or Appearance.

Entered: May 26, 1938.

On this day again come the parties herein, by their respective counsel; also come the jury heretofore empaneled and sworn to try said cause, and the trial proceeds.

At the close of all the evidence, plaintiff is given leave to amend the amended petition by interlineation to conform to the evidence, and it is

Ordered, That default of defendant A. M. Stephenson be, and it is hereby noted, for want of pleading or appearance.

And the hour of adjournment having arrived, it is now ordered that further proceedings herein be, and they are, continued until 9:30 A. M., on Friday, May 27, 1938.

Jury Hears Arguments of Counsel—Receives Charge of Court—Retire To Deliberate.

Entered: May 27, 1938.

On this day again come the parties herein, by their respective counsel; also come the jury heretofore empaneled and sworn to try said cause; and the testimony having been completed, the jury hears the arguments of the respective counsel and the charge of the Court, and retires in charge of a bailiff, specially sworn, for deliberation.

[fol. 30] Jury Presents Verdict For Plaintiffs.

Entered: May 28, 1938.

The jury deliberating in the above entitled cause now comes into court, and by their foreman and in their presence, returns a verdict in words and figures following, to-wit:

"Verdict For Plaintiff

United States District Court, District of Nebraska,
Lincoln Division.

Lawrence Yearsley, Et Al., Plaintiffs,
No. 1065. vs. Law.
Ross Construction Company, Et Al., Defendants.

Verdict.

We, the Jury in the above-entitled cause, find in favor of the Plaintiffs therein and against the defendant Ross Construction Company, and assess the plaintiffs' damages at the sum of Eight Hundred Six and No/100 Dollars.

1. How much of above amount does the jury allow because of destruction of plaintiffs' land by use of defendant's paddle boats? $.....

2. How much of above amount does the jury allow because of destruction of plaintiffs' land by reason of defendant's construction of the three dikes numbered as mentioned in the instructions? $.....

3. Is the jury unable to separately state the amounts allowed under questions 1 and 2? Yes

Dated this 28th day of May, 1938.

LEO GORMAN,
Foreman."

Thereupon, the jury is dismissed from the case.

[fol. 31] Judgment On Verdict.

Entered: June 6, 1938.

The jury having heretofore, on the 28th day of May, 1938, returned its verdict in favor of the plaintiffs Lawrence Yearsley and George Yearsley, and against the defendant Ross Construction Company, it is therefore,

Considered, Ordered, and Adjudged that said plaintiffs, Lawrence Yearsley and George Yearsley do have and recover of and from the said defendant Ross Construction Company, the sum of Eight Hundred Six and No/100 ($806.00) Dollars, and the costs of this suit to be taxed, and that said plaintiffs do have execution therefor.

[fol. 32] Notice of Appeal.

Filed: June 7, 1938.

To whom it may concern, and to the above named plaintiffs, appellees, or their attorneys of record:

You will please take notice that the defendant, W. A. Ross Construction Company, a corporation, feeling aggrieved by the judgment rendered and entered in the above entitled cause on or about the 6th day of June, 1938, does appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, a copy of defendant's petition for appeal being hereto attached.

PAUL JESSEN,
JOHN M. DIERKS,
CLAY C. ROGERS,
Attorneys for Defendant.

Service of a true copy of the within and foregoing notice of appeal and also a copy of the petition for appeal acknowledged and accepted this 7 day of June, 1938.

PERRY, VAN PELT & MARTI,
DWYER & DWYER,
Attorneys for Plaintiffs.

[fol. 33] Petition For Appeal.

Filed: June 7, 1938.

The above named defendant, W. A. Ross Construction Company, a corporation, feeling aggrieved by the judgment, orders, rulings, and decision of the court in the above entitled cause, made and entered on the 6th day of June, 1938, does hereby appeal from said judgment, orders, and rulings of the court in the above entitled cause and the final judgment, order, and decision therein, for the reasons set forth in the assignment of errors herewith filed, and said defendant prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rulings of said court in cases made and provided.

Defendant presents herewith its appeal bond in the sum of Two Thousand Dollars ($2,000.00), and prays that said bond be approved.

PAUL JESSEN,
JOHN M. DIERKS,
CLAY C. ROGERS,
Attorneys for Defendant.

[fol. 34] Assignment of Errors.

Filed: June 7, 1938.

Comes now the above named defendant, W. A. Ross Construction Company, a corporation, and files the following assignment of errors upon which it is relying in the prosecution of its appeal in the above entitled cause, and which said errors, it asserts, were committed in the proceedings and judgment in said cause and which it intends to urge in the United States Circuit Court of Appeals for the Eighth Circuit, to-wit:

1. The court erred in overruling defendant's written motion for a directed verdict at the conclusion of the evidence offered on behalf of the plaintiffs, said motion for a directed verdict being as follows:

"At the conclusion of the evidence offered on behalf of plaintiffs, the defendant, W. A. Ross Construction Company, moves the court to direct the jury to return a verdict in favor of that defendant for the reason that under the pleadings, the law and the evidence, the plaintiffs have failed to establish a cause of action for damages against that defendant for (a) the alleged cutting of timber; (b) the alleged flooding of land in controversy; (c) for the alleged taking or washing away of land in controversy."

for the reason that the evidence did not show that any land which was then in controversy and designated in the plaintiffs' petition had been taken or destroyed. The petition alleged that the plaintiffs were the owners of 250 acres of land, and it was claimed in the petition that the defendant had taken 100 acres of that land. The 250 acres of land was what was referred to in the evidence as the deeded land, and the evidence conclusively proved that none of the deeded land had been taken or destroyed.

2. The court erred in overruling defendant's written motions for directed verdict, which the defendant presented at the close of all the evidence, as follows:

"At the close of all the evidence, the defendant herein, W. A. Ross Construction Company, moves the Court (1) to instruct the Jury to return a verdict in favor of said defendant, and to enter a judgment in favor of said defendant, for the following reasons:

a. Because there is no evidence in the record that any of Plaintiff's land mentioned and described in his Petition has been either taken, damaged or destroyed by this defendant;

[fol. 35] b. Because if any of Plaintiff's land or property was either damaged or destroyed by this defendant, it was done by said defendant while acting as agent of the United States, and pursuant to an Act of Congress authorizing the improvement of the Missouri river for the purpose of navigation, and was an indirect or consequential damage due to such work, for which neither this defendant nor the United States government is responsible;

c. Because if any property of Plaintiff herein has been taken for public use, within the meaning of the Constitution of the United States, Plaintiff's redress for such damages is in the United States Court of Claims, and not in an action for damages in this Court;

d. Because under the pleadings, the evidence and the law, the Plaintiff is not entitled to a judgment against this defendant for any amount of damages alleged to have been sustained by him."

"At the close of all the evidence, the defendant herein, W. A. Ross Construction Company, moves the Court to withdraw from the consideration of the jury, and (2) enter a judgment in favor of said defendant, on the claim for damages set out in Plaintiff's Petition, based on the washing-away of Plaintiff's land by the boats of the defendant, for the following reasons:

a. Because the evidence conclusively shows that no such washing-away was done by this defendant or its agents or servants or employees on any land mentioned and described in Plaintiff's Petition;

b. Because the evidence conclusively shows that whatever washing-away of land there was, was all done north of Plaintiff's land, and under the direction of the Engineers of the United States War Department for the purpose of improving the Missouri river for navigation;

c. Because if such washing-away was done on Plaintiff's land, it constitutes an indirect and consequential damage to which such land was subject because of the dominant right of the United States to improve the Missouri river for navigation;

d. Because if such artificial erosion constitutes a taking of "private property for public use within the meaning of the Constitution of the United States, a Court of Claims is the proper tribunal in which Plaintiff should recover his damages, and an action in tort will not lie against the United States or its agents or subsidiaries for such taking."

for the reasons stated in said motions for directed verdict.

3. The court erred in refusing to give instruction No. 1 requested by the defendant, W. A. Ross Construction Company, which said requested instruction is in words and figures, as follows:

"If the jury find and believe from the evidence that the accreted land that had been washed away before April 12, 1938 consisted of a sand bar or series of sand bars and resulted from deposits made by the Missouri river and if you further find from the evidence that the River at the place mentioned in evidence, has, from time to time, since 1917 moved over and occupied the location of said accreted [fol. 36] lands, and if you further find from the evidence that all of the land washed away before April 12, 1938 was below the ordinary high water lines of the said River, and if you further find from the evidence that said river had no set or established channel or water course at the place mentioned in evidence, and was reasonably likely to change its course and wash away the lands in question, without the intervention or act of the defendant, then you should return a verdict for the defendant."

for the reason that said requested instruction clearly declares the law of the case, and the substance of it was not included in the charge of the court to the jury.

4. The court erred in refusing to give instruction No. 2 requested by the defendant, W. A. Ross Construction Company, which said requested instruction is in words and figures, as follows:

"I charge you that under the evidence in the case the dikes 602.7, 602.7-a and 601.9 were constructed by the defendant W. A. Ross Construction Co. under and pursuant to contracts between the United States and the defendant Ross Construction Co. I further charge you that if you find and believe from the evidence that the construction of the dikes was done in accordance with Governmental plans and specifications and under Governmental supervision and at the places designated by the Government, and if you further find from the evidence that the washing away of any land claimed by the plaintiff was incidental and consequential to the work directed by the Government in the improvement of the Missouri, which I charge you is and was a navigable river, for the purpose of navigation, then I charge you that plaintiff cannot recover and your verdict must be for the defendant W. A. Ross Construction Co."

for the reason that said requested instruction clearly declares the law of the case, and the substance of it was not included in the charge of the court to the jury.

5. The court erred in refusing to give instruction No. 3 requested by the defendant, W. A. Ross Construction Company, which said requested instruction is in words and figures as follows:

"I charge you that the Missouri River is and was a navigable river and that the United States has the absolute and unqualified power to improve the river for purposes of navigation. I further charge you that the Government had the right to contract with the defendant W. A. Ross Construction Co., for the doing of such work as the Government had the right to do in respect thereto, and if done in such a way that the Government would not be liable for damages, then the defendant W. A. Ross Construction Co. would not be liable in damages.

I further charge you that there are certain injuries which result from improvements of navigation which are known as incidental or consequential and which do not entitle the person injured to any damages. Those damages are such [fol. 37] as result from the exercise of the governing authority over the usual and ordinary course and channel of the river.

Therefore I charge you that if you find from the evidence that the construction of the dikes on the east side of the river at the place in question, was for the purpose of improving the river for the purposes of navigation and to stabilize the channel of the river at a place theretofore occupied by it in its usual and ordinary course, then I charge you that the United States would have the right, in such circumstances to make such improvements, and would have the right to contract with defendant W. A. Ross Const. Co. for the performance of such work, and would not be liable, in such circumstances to the plaintiff because any injuries resulting therefrom are incidental and consequential."

for the reason that said requested instruction clearly declares the law of the case, and the substance of it was not included in the charge of the court to the jury.

6. The court erred in refusing to give instruction No. 4 requested by the defendant, W. A. Ross Construction Company, which said requested instruction is in words and figures, as follows:

"If the jury finds from the evidence that the dikes and revetment work upon the east side of the river diverted the course of the river against the land claimed by the plaintiff so that in the natural flow of the river the land claimed by the plaintiff would be eroded or eaten away, then you are instructed that the mere fact that defendant W. A. Ross Const. Co. made use of a paddle boat to help the river "erode or eat away the land claimed by the plaintiff would not render said defendant liable or responsible to plaintiff."

for the reason that said requested instruction clearly declares the law of the case, and the substance of it was not included in the charge of the court to the jury.

7. The court erred in charging the jury as follows:

"There has been some evidence about the building of dykes and revetments along the Missouri River quite a distance northerly and southerly of the land for whose destruction the plaintiffs are claiming damages in this case. But under the pleadings and the evidence in this case, you are instructed that as to dykes, you are to consider only the dyke known as 602.7 and its trailer, dyke 602.7-a, and the dyke known as 601.9 as shown by the evidence. If you find that as a direct effect of the building by the defendant of the numbered dykes, I have just mentioned, or of the building of one or more of them, or that as the direct effect of the process of washing done by the defendant's boats, done by anchoring or holding the boats in place and revolving the paddle wheels near to and forcing the water against the land of the plaintiffs, or that as the direct effect of such washing combined with the direct effect of the building of the numbered dykes, or some of them, which I have mentioned, the waters of the Missouri River were forced against the plaintiffs' land and caused the land to fall into the river and be washed away, so that the use of such land was permanently destroyed and permanently lost to the plaintiffs, then the plaintiffs would be entitled to recover a sum equal to two-thirds of the fair and reasonable cash market value at the time of its destruction of the [fol. 38] land which was so destroyed by the defendant, with interest on such sum at 6% from such date until the time of the finding of your verdict. When I said that the destruction of the land must be the direct effect of the defendant's acts in the particulars I stated, if is meant that the defendant's acts must have been the proximate cause, the direct and immediate cause of the destruction of the land. If the cause of the destruction was the usual or unusual action of the river itself, independent of the numbered dykes, or if such cause was a change in the course of the river above these numbered dykes, or if the destruction was the result of building of the dykes or revetments above these numbered dykes, then the plaintiffs are not entitled to recover for any acts of the defendant in the construction of these numbered dykes. If the Missouri

River, by reason of its volume and because of the course it was given above these numbered dykes caused the washing away of the plaintiffs' lands and dykes did not really—that is, the numbered dykes—did not really and directly cause the destruction by diverting the water, then the defendant would not be responsible in this action. In other words, if the destruction would have been done even if these dykes had not been built, then the plaintiff could not recover for such destruction. As to the washing done by boats referred to as paddle washing, if you find that because of such washing done by defendant some of the plaintiffs' lands were permanently washed away and destroyed, then the plaintiffs would be entitled to recover for two-thirds of the fair and reasonable cash market value of such land as was so destroyed, if it was destroyed as the direct and immediate effect of such washing."

for the reason that it is shown without controversy that the work done by the defendant was under and pursuant to the authority of the United States and at the direction of the United States in the exercise of the Governmental power to improve the river for navigation, and, therefore, under the law, no liability or obligation could rest upon the defendant for the alleged taking of said land.

8. The court erred in charging the jury as follows:

"The fact that the defendant had contracts with the United States, which have been referred to as Exhibits 9 and 10 in this case, to do the work specified therein, and the fact that it followed the plans and specifications as to the work which were furnished by the United States Engineers in charge, and the fact that the work was approved by the government officers in charge would not be a defense in this action. Neither would the fact that the dykes were located where they were and constructed as they were according to the plans and specifications and orders of the United States Engineers and according to the contracts that they had entered into."

for the reason that the charge is contrary to the law and denies the power and authority of the United States to improve the river for navigation, and for the further reason that all of the alleged damage to the plaintiffs is shown conclusively by the evidence to have been but incidental

[fol. 39] and consequential of the improvement of the Missouri River for the purposes of navigation.

9. The court erred in submitting the case to the jury.

10. The court erred in entering judgment upon the verdict of the jury in favor of the plaintiffs.

11. The court erred in refusing to enter judgment for the defendant because the verdict and judgment is for the wrong party.

Wherefore, the defendant, W. A. Ross Construction Company, appellant herein, prays that the judgment entered in said cause, for the errors aforementioned, be reversed by the United States Circuit Court of Appeals for the Eighth Circuit.

PAUL JESSEN,
JOHM M. DIERKS,
CLAY C. ROGERS,
Attorneys for Defendant.

Received copy of the foregoing assignment of errors this 7 day of June, 1938.

PERRY, VANPELT & MARTI,
By VanPelt.

DWYER & DWYER,
Attorneys for Plaintiffs.

[fol. 40] Order Allowing Appeal.

Filed and Entered: June 7, 1938.

Now on this day, there is presented to this court the petition of the defendant, W. A. Ross Construction Company, a corporation, praying for the allowance of an appeal herein to the United States Circuit Court of Appeals for the Eighth Circuit, and it appearing to the court that there has been filed with said petition for appeal an assignment of errors setting forth, separate and apart, each error intended to be urged, and it further appearing that good and sufficient bond has been tendered in the sum of Two Thousand Dollars ($2000.00), being double the amount of the judgment in addition to the accrued costs,

It is, therefore, ordered by the court that an appeal be and the same is hereby allowed said defendant as provided by law, to the United States Circuit Court of Appeals for the Eighth Circuit, to review the proceedings and judgment in this case, whereby judgment was entered in favor of the plaintiffs and against the defendant on the 6th day of June, 1938; that citation issue as provided by law; that a full transcript of the proceedings be by the clerk of this court presented and filed with the United States Circuit Court of Appeals for the Eighth Circuit, and that the appeal bond hereby tendered is approved.

It is further ordered that the defendant be and is hereby given on or before ninety days from this date in which to file a bill of exceptions.

Dated this 7th day of June, 1938.

THOS. C. MUNGER,
District Judge.

[fol. 41] Appeal Bond.

Filed: June 7, 1938.

We, the undersigned, W. A. Ross Construction [—], a corporation, as principal, and Central Surety and Insurance Corporation, as surety, do hereby acknowledge ourselves indebted to Lawrence Yearsley and George Yearsley in the sum of Two Thousand Dollars ($2,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we do hereby bind ourselves, our successors and assigns.

The condition of this bond is such that:

Whereas, the defendant, W. A. Ross Construction Company, a corporation, as appellant, is prosecuting an appeal from the judgment heretofore rendered in the United States District Court for the District of Nebraska, Lincoln Division, against it and in favor of the plaintiffs herein, to the United States Circuit Court of Appeals for the Eighth Circuit.

Now, Then, if said defendant, appellant, shall prosecute its appeal to effect, and, if it fails to make its plea good,

shall answer all damages and costs, then this bond shall be null and void, otherwise to remain in full force and effect.

Executed this 3rd day of June, 1938.

W. A. ROSS CONSTRUCTION COMPANY,
By Clay C. Rogers, Agent.

CENTRAL SURETY & INSURANCE CORPORATION,
(Corporate Seal)
By Eugene F. Eisenman,

EUGENE F. EISENMAN,
Attorney-in-fact.

Approved June 7-1938.

THOS. C. MUNGER,
District Judge.

[fol. 42] (Citation and Acknowledgment of Service.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

Lawrence Yearsley and George Yearsley, Plaintiffs,
No. 1065. vs. Law.
W. A. Ross Construction Company, a corporation, Defendant.

To Lawrence Yearsley and George Yearsley—Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, Missouri, forty days from and after the day this citation bears date, pursuant to an order allowing appeal filed and entered in the office of the clerk of the United States District Court for the District of Nebraska, Lincoln Division, wherein the W. A. Ross Construction Company, a corporation, is defendant, and you are plaintiffs, to show cause, if any there be, why the judgment and decision entered on the 6th day of June, 1938, against the said defendant, W. A. Ross Construction Company, as in said order mentioned, should not

be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Thomas C. Munger, Judge of the United States District Court before whom said cause was tried, this 7th day of June, 1938.

THOS. C. MUNGER,
District Judge.

Service of the above citation and receipt of a true and correct copy thereof is hereby acknowledged this 7 day of June, 1938.

DWYER & DWYER,
PERRY, VanPELT & MARTI,
By R. VanPelt,
Attorneys for Plaintiffs.

[fol. 43] Order Extending Time for Filing Transcript and Appearance Date for Plaintiffs in the United States Circuit Court of Appeals.

Filed and Entered: July 19, 1938.

Now on this 18th day of July, 1938, this matter came on for hearing upon the application of defendant, W. A. Ross Construction Company, a corporation, for an order extending the time in which to file a transcript of the record in this proceeding in the United States Circuit Court of Appeals for the 8th Circuit and extending the appearance date for plaintiffs to be and appear in said Court, and it appearing to the Court that the extension of time sought by said application should be granted.

It Is, Therefore, Ordered that the time for filing a transcript of the record in this proceeding in the United States Circuit Court of Appeals for the 8th Circuit be and is hereby extended to September 5, 1938, and the date for plaintiffs to be and appear in said Circuit Court of Appeals in the city of St. Louis, Missouri pursuant to the citation heretofore issued and served on July 7, 1938, be

and is hereby extended forty days from said September 5, 1938.

By the Court,

J. A. DONOHOE,
District Judge.

THOS. C. MUNGER,
District Judge.

Receipt of a copy of the foregoing order is hereby acknowledged and consent is hereby given to the entry of said order without further notice. Dated this 9 day of July, 1938.

W. L. DWYER,
ROBERT VAN PELT,
Attorneys for Plaintiffs.

[fol. 44] Order Extending Time to File Bill of Exceptions and Docket Appeal.

Entered: August 15, 1938.

Upon application of the plaintiff, and for cause shown, it is here Ordered, That the time in which to file bill of exceptions and to docket appeal be, and it is hereby, extended to November 5, 1938.

[fol. 45] Election as to Printing of Transcript.

Filed: October 15, 1938.

Defendant, W. A. Ross Construction Company, a corporation, appellant herein, hereby gives notice of its election to take and file in the United States Circuit Court of Appeals, Eighth Circuit, a transcript of the record, or of the part thereof requisite to the hearing of this case in that Court, to be printed under the supervision of the Clerk of said Court of Appeals under its rules.

W. A. ROSS CONSTRUCTION COMPANY, a corporation,
Defendant and Appellant.

By Clay C. Rogers,
Paul Jessen and
John M. Dierks,
Its Attorneys.

Receipt is hereby acknowledged of a copy of the foregoing notice of election as to printing of transcript this 15 day of October, 1938.

W. L. DWYER,
ROBERT VANPELT,
Attorneys for Plaintiffs and Appellees.

[fol. 46] Bill of Exceptions.

(Filed in U. S. District Court on October 15, 1938.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

Lawrence Yearsley and George Yearsley, Plaintiffs,
No. 1065. vs. Law.
W. A. Ross Construction Company, a corporation, and A. M. Stephenson, Defendants.

Be It Remembered that commencing on the 18th day of May, 1938, and continuing on May 19, 20, 24, 25, 26 and 27, the above entitled cause came on for hearing before the Honorable Thomas C. Munger, Judge of the United States District Court for the District of Nebraska, Lincoln Division, and a jury duly impaneled; plaintiff, Lawrence Yearsley, appearing in person and said plaintiff and the other plaintiff, George Yearsley, appearing by their attorneys, Mrs. W. L. Dwyer, of Plattsmouth, Nebraska, and Mr. Robert Van Pelt, of Lincoln, Nebraska, and defendant, W. A. Ross Construction Company, appearing by its attorneys, Messrs. Clay C. Rogers, of Kansas City, Missouri, and Paul Jessen and John M. Dierks, of Nebraska City, Nebraska, the following proceedings were had and entered of record in said cause:

Plaintiff's Evidence.

Thereupon to sustain the issues on their part the plaintiffs offered the following evidence, to-wit:

LAWRENCE YEARSLEY, one of the plaintiffs, being first duly sworn as a witness on his own behalf, testified in substance as follows:

Direct Examination.

My name is Lawrence Yearsley and I live on the land involved in this action. I have been acquainted with the land since 1912 when my father bought it. My brother-in-law, A. M. Stephenson, my brother, George Yearsley, and I bought the land at referee's sale in 1928 after father's death. I recently bought out the undivided 2/3rds interest [fol. 47] of my brother and brother-in-law, just a few days before I traded the land to Paul Jessen, one of the attorneys for defendant, Ross Construction Company. Defendant Ross Construction Company knew nothing about my trade with Mr. Jessen and had nothing to do with it. I farmed the land and lived on it from 1912 until 1922, then moved away for eight years, and moved back on the land in 1930 and have lived there ever since. My farming operations consist of raising wheat, corn, alfalfa, cattle and hogs. Between 1930 and the summer of 1937 I never saw the water of the Missouri River cover my pasture land and sweet clover ground.

This witness described the land as the Northwest Quarter (NW¼) and the North One-fourth of the Southwest Quarter (SW¼) and the West One-fourth of the Northeast Quarter (NE¼) and the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of the Southeast Quarter (SE¼), all in Section Thirty-one (31), Township Eight (8), Range Fifteen (15), in Otoe County, Nebraska, as the 250 acres of deeded land, and described the accretions as the East One hundred and twenty (120) acres of the Northeast Quarter (NE¼) and the East 2/3rds of the North Half (N½) of the North Half (N½) of the Southeast Quarter (SE¼) of said Section Thirty-one (31), containing in all about 406 acres. The accretion land extends East to the West bank of the Missouri River.

The witness testified with reference to the East One Hundred and twenty (120) acres above referred to as follows:

"It was blue grass and I sowed sweet clover, cottonwood trees, and there was a good pasture, and I farmed some of it, part on the West side. I farmed part of the 120 acres. Blue grass pasture laid in the North, extending from the river half way south with about 50 or 55 acres in blue grass.

Part of this land was cultivated in corn or wheat, it being that part that joined the West 120 acres on the South end."

In 1934 before river improvement operations were commenced there was about 60 to 65 acres of blue grass and sweet clover East of the deeded land on the North portion of the accretion land, and the lower portion of the accretion land was in willows and some grass in spots. The fair and reasonable cash market value of this land in 1934 prior to commencement of any operations was $50.00 per acre in my opinion.

[fol. 48] The river had been moving East since 1923 away from my land until about 1934 and 1935 when they (construction company) commenced pushing the river back the other way. Ross Construction Company commenced its operations on the Missouri River in the vicinity of my farm in 1934. They started driving dikes on the Iowa side opposite my land. The dikes were started out on the land on the Iowa side and then extended out into the water and across the river toward my land and when they got over to my bank they used paddle boats to cut out the land. They run a long cable back on my land to hold a paddle boat up against the bank and whirled the paddle to wash the land away and would then drive piling on out toward my land.

I heard Bob Vivian, Superintendent of Ross Construction Company, order his pile driver foreman "to keep on driving that dike out or we never will get this bank cut away and keep that channel open so boats can run through". The river bank would fall in fast in big chunks. This was in the year 1934. One dike extending out from the Iowa side toward my land was about one and one-half miles long and had a trailer dike extending out South from it. The trailer dike was screened by nailing lumber behind the dike so that water and mud could not get through it and the big dike was also screened about half way across the river. The dike consisted of wooden piling driven in clumps of two or three cabled together with steel cable and the clumps were connected by a stringer piling. The long dike came within about 100 feet or a little closer of my land at about the center of the East line of my farm. Water could not get through the dike and it would run out over my land and in July of 1937 covered blue grass with mud and ruined [by] pasture.

The paddle boats washed against my land for three weeks, day and night, and the paddle boat "Judge Ross" ran up and down by my land practically every day and if it wasn't there, the little Diesels were running up there whirling it. The boats washed away about 25 or 30 acres of my land and in all I lost about twice that much land, the dike and the boats cut the land away The head of the dikes were screened and whirled the water and big chunks of the bank [fol. 49] would fall right off into the river. Then the Construction Company would bring a driver up and drive more piling on the end of the dike; come on further [agin] the bank up close to my farm.

About 5 or 6 acres of cottonwood trees 2½ feet in diameter and 30 to 45 feet high, big enough for a 16 to 20 foot cut of saw lumber, were cut down at the North end of my land and the growth would average 100 trees per acre. Back of the cottonwood timber where I cleared this off, I had corn three years ago that made forty bushels. There was about twenty acres there. It was on the South part of the accretion land. The witness marked with a heavy blue penciled cross just East of where the river bank was in 1928 as indicated upon plaintiff's Exhibit "1" the approximate location of the corn land. The land indicated as sandbar in 1930 on Exhibit "1", was in 1934, just prior to the Ross Construction Company starting operations on the river, good heavy land. Was good, black soil.

Cross-Examination.

I worked for the defendant, Ross Construction Company, in the fall of 1934 for about 5 or 6 weeks in the construction of a dike about one mile South of my land. I never worked on the dikes extending from the Iowa side over toward my land, but would go over there in a row boat and saw them working on those dikes.

In 1928 the river was a good ways further East than the line marked "River bank, 1928" shown on plaintiff's Exhibit "1". At that time there was quite a sandbar out in front of that line. I made the clearing marked with a cross on said Exhibit "1" in 1922 or 1923. In between the clearing and sandbar to the East were willows and small cottonwoods. In 1923 the river took a southwesterly course in front of my land and cut back into the deeded land about 50

or 75 feet at the southeast corner of the deeded land. When the river receded from the land, it left a sandbar and gumbo that filled in the land during the next couple of years and willows and grass began to grow on it. A slough runs in a southwesterly direction across the lower end of the land and now has about 5 or 6 feet of water in it.

[fol. 50] On Exhibit "1" at the request of defendant's counsel this witness drew a line with a blue pencil showing where the slough is now and testified that this line is where they turned the water down through there and that he had drawn it the best he could on the exhibit and in answer to a question of whether the slough as marked on the exhibit by him with the blue pencil would be out in the river, this witness said, "No, there is land on each side of it; I say slough, it is a big creek now cut down through there and filled with water".

The southeast corner of the deeded land has been grown up in willows ever since 1923. The strip of cottonwood timber where the timber cutting was done was all East of the proposed revetment line and extended from the North line and was about 100 rods long and about 50 to 60 rods wide. There was only one time when the five or six acre patch of timber was cut and that was in the spring of 1937—about the first of June. The cutting commenced North of my North line and extended a rod or two in on my deeded land at the northeast corner and about 15 to 20 rods South of my North line.

The sweet clover in the northeast corner began back in the timber and extended out to the river and was sowed in 1935 after blue grass had died out. (Testimony as to when sweet clover was sowed was later changed to 1930 and then to 1928) Another patch of sweet clover was about one-quarter of a mile South of the above mentioned patch. The blue grass extended about one-quarter of a mile East of the deeded land at the North end and on East of the blue grass were willows, marshes and rushes for 7 to 8 rods down to the water of the river.

The dikes were driven in clumps of three pilings about 3 to 4 feet apart and were driven up close to my land, leaving enough room for a boat to go through, about 50 to 60 feet from my land and sometimes closer, 25 to 30 feet.

The first spring the Construction Company came up the river, they tied up at my land and washed quite a bit away before there was even a dike there, but the most washing was done in the fall. The big long dike was run up against my land and then they started washing again, cutting back [fol. 51] into the blue grass and sweet clover. The river keeps digging itself in and is washing my land away pretty fast.

The land East of where the river now is was practically of the same substance and character as the land right along the river bank at the present time, except that the land is now covered with about six inches of sand and mud that washed over the top of it in July, 1937 and covered up my grass and sweet clover.

Redirect Examination.

I estimated the distances to which I testified; I never went out with a chain and measured these distances. The line on Exhibit "1" designated "Y to Z" is my idea of where the proposed revetment line is and where the United States Government sets stakes down through the timber.

CHARLES A. SHANNON, being first duly sworn as a witness on behalf of plaintiffs, testified in substance as follows:

Direct Examination.

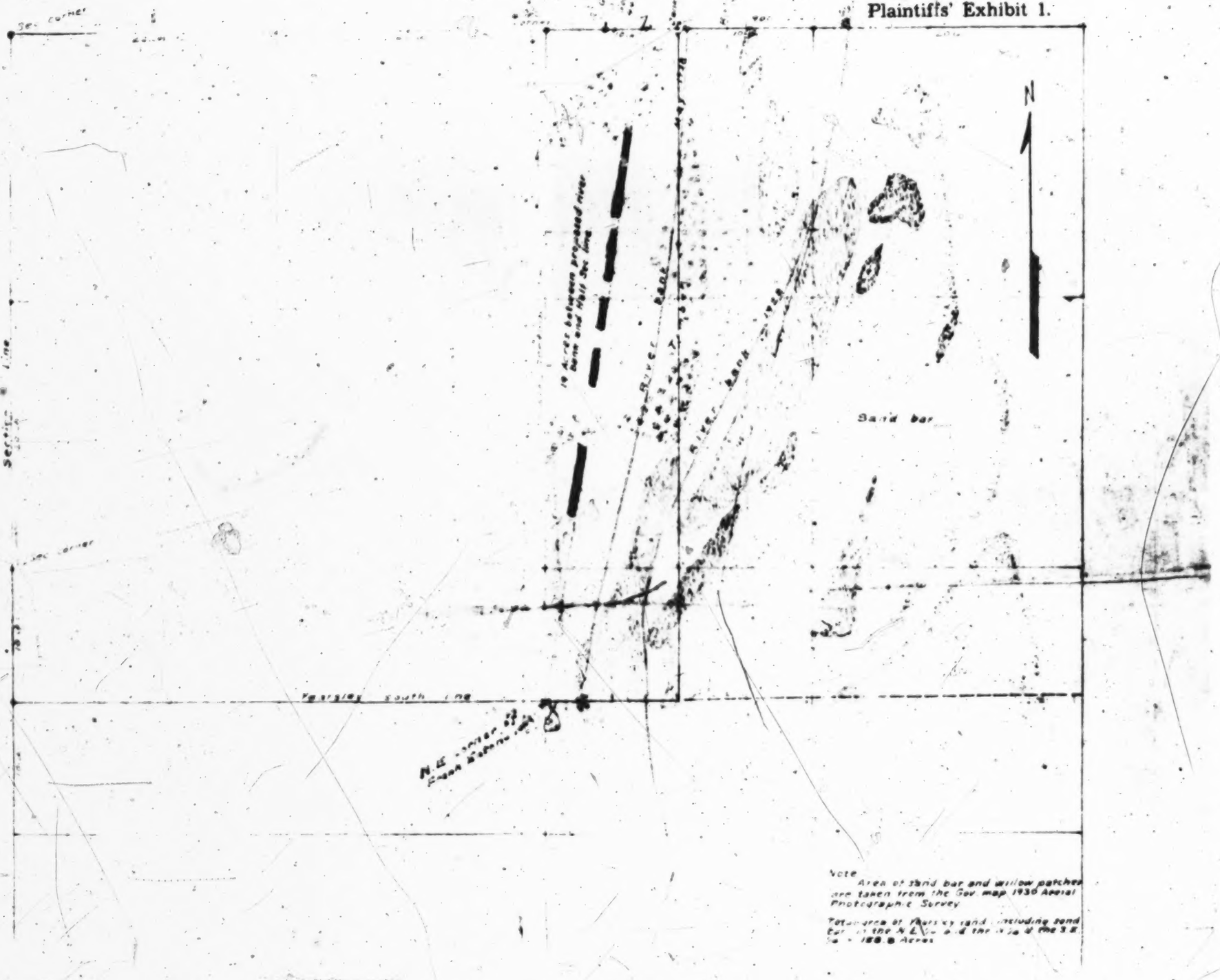
My name is Charles A. Shannon and I am County Surveyor of Otoe County, Nebraska, having held that position since 1908. I prepared plaintiff's Exhibit "1" which is a map or drawing of Section 31, Township 8, Range 15, in Otoe County, Nebraska, showing the location of the Yearsley land, which comprises the Northwest Quarter (NW¼) and the North One-fourth of the Southwest Quarter (SW¼) and the West One-fourth of the Northeast Quarter (NE¼) and the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of the Southeast Quarter (SE¼) of said Section 31, containing 250 acres of deeded land, and all land in the Northeast Quarter and the North One-fourth of the Southeast Quarter of said Section 31 lying East of the deeded land and known as accretion land.

I surveyed the West bank of the Missouri River in this vicinity in the summer of 1928 and the line shown on said

Exhibit "1" and marked "River bank, 1928" was located from the measurements made and field notes taken at the time of said survey. About a week ago I made a survey along the North line of the Yearsley property and from this [fol. 52] survey located on Exhibit "1" the point where the river bank intersected the North property line at that time and also where the proposed Government improvement line intersects the North line of the Yearsley property. The areas designated as sandbar and willow patches were taken from the 1930 Government airplane maps and the areas marked timber were taken from my 1928 survey. (Although the surveyor's certificate attached to said Exhibit "1" certifies that the line drawn thereon as the location of the river bank in May, 1938 was made from measurements made by the surveyor, the later testimony of this witness on cross-examination shows that said line marked "River bank, May, 1938" was located from what Mr. Lawrence Yearsley, plaintiff, told the surveyor, except at the point where it intersects the North property line, and that said line marked "River bank, May, 1938" as shown on said Exhibit "1" is incorrect).

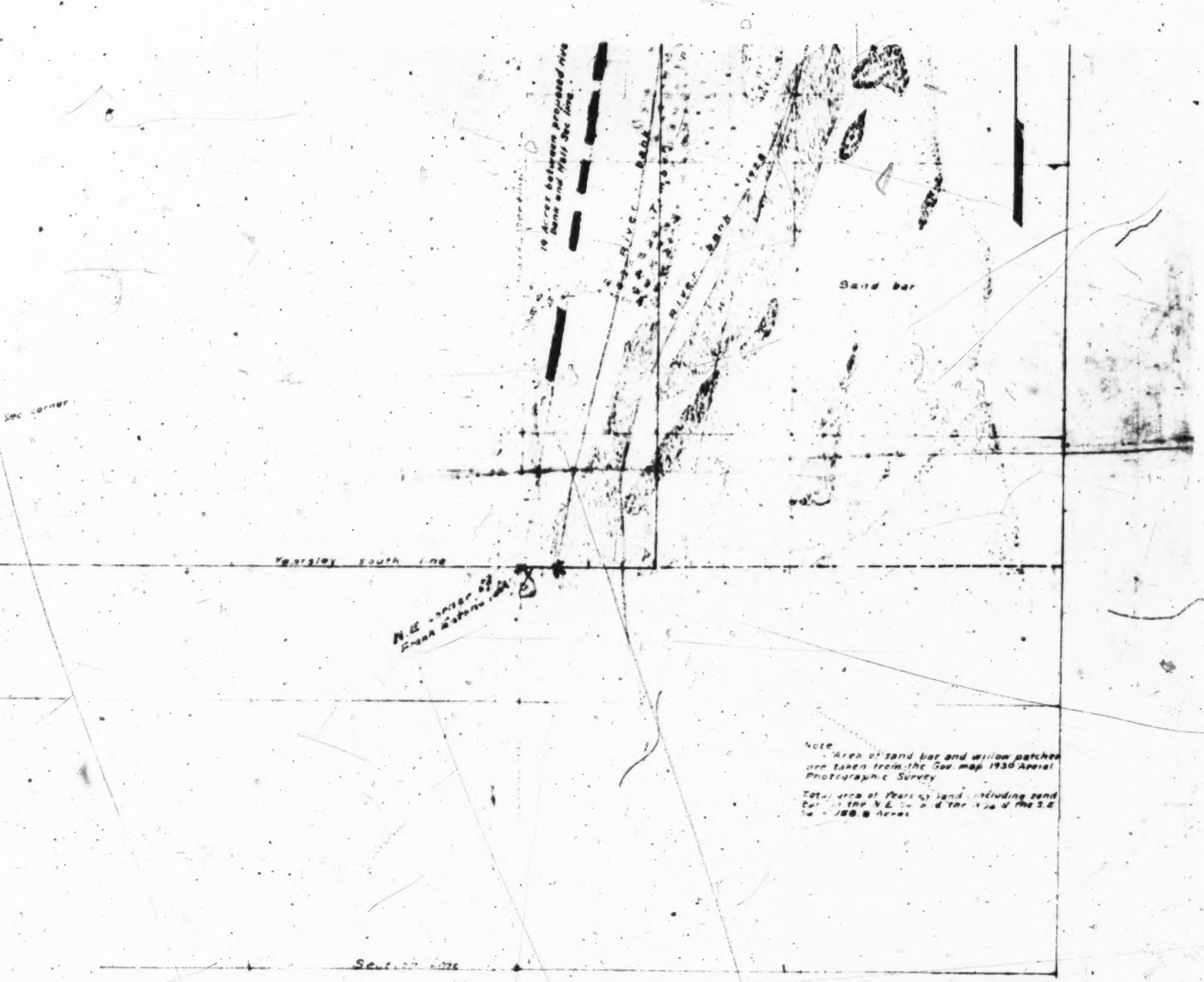
Plaintiff's Exhibit "1" was offered in evidence and received, the original of said exhibit being attached to this Bill of Exceptions, and the following is a blue print copy thereof.

Plaintiffs' Exhibit 1.



Note
Area of sand bar and willow patches are taken from the Gov. map 1936 Aerial Photographic Survey

Total area of Pearsey land including sand bar in the N.E¼ and the W½ of the S.E¼ = 188.8 Acres



Note
Area of sand bar and willow patches are taken from the Gov. map 1938 Aerial Photographic Survey

Total area of Yearsley land including sand bar in the N.E. ¼ and the N.W. ¼ of the S.E. ¼ = 158.8 Acres

Sec 31-T8-R15
OTOE COUNTY, NEBR
Scale 8 Rods = 1 inch

I hereby certify that in 1928 I surveyed the banks of the Missouri River, and that said survey and the plat thereof drawn by me or under my supervision, and that the Missouri River Bridge Company

[fol. 54] Cross-Examination.

The northeast corner of the Yearsley deeded land is indicated by a circle and the wording "NE corner of deeded land". The gas pipe shown on said exhibit on the North property line is 2,937 feet from the corner stone in the northwest corner of said Section 31. The proposed West channel line of the river designated by the Government crosses the North line of the Yearsley deeded land 200 feet East of the gas pipe above mentioned and 163 feet West of the northeast corner of the deeded land. I also surveyed the North line of the Yearsley property in 1935 and made surveys of the Yearsley land along the river front in 1923, 1917 and 1912. The West bank of the river was considerably farther out East in 1917 than it is now. (Witness excused subject to re-call for further cross-examination).

CHARLES A. SHANNON, being recalled for further cross-examination on the following date, May 19, 1938, testified in substance as follows:

The point where the line marked "River bank, May, 1938" on said Exhibit "1" intersects the North Yearsley property line was located by measurements made by me on the ground and the rest of said "River bank, May, 1938" line through the section was drawn on said Exhibit "1" from what Mr. Lawrence Yearsley, plaintiff, told me concerning the same. Since testifying in this case yesterday, I went on the land again this morning and found that the river does not run in the direction shown by said line "River bank, May, 1938" on Exhibit "1". I walked along the South line of the Yearsley property and made measurements as I proceeded eastward toward the river and found that the point where the West bank of the river intersects the South line of the Yearsley property is a good quarter of a mile East of where it is marked by said line on Exhibit "1". The course of the river along the Yearsley property is actually in a southeasterly direction instead of in a southwesterly direction as shown on Exhibit "1".

The letter "S" on Exhibit "1" marks the slough where it crosses the South line of the Yearsley land, a distance of 975 feet East of the East line of the Yearsley deeded land. It is a narrow chute of flowing water that branches [fol. 55] off the main channel of the Missouri River above the South line of the Yearsley land.

The letter "R" on Exhibit "1" marks the approximate location of the West bank of the Missouri River where it crosses the South line of the Yearsley land, and is a distance of at least 1000 feet on East of the slough.

At the time of preparing Exhibit "1" when I asked Mr. Yearsley about the location of the West bank of the river on his South line, I inquired concerning a certain patch of willows to which I had measured in my 1928 survey and in giving me the information from which I drew said line on Exhibit "1", Mr. Yearsley may have misunderstood what patch of willows I was referring to.

As you go along the South line of the Yearsley property the soil is good heavy gumbo, except that when you get out toward the river bank there is a little more of a mixture of sand with the soil. Along the South side of the Yearsley property, between the East line of the deeded land and the slough, the growth on the ground is all willows.

Redirect Examination.

I walked along the South side of the Yearsley land this morning a distance of 4,280 feet from the southwest corner of the deeded land and made measurements as I went and took field notes. I came to a low swale about 70 to 80 feet wide just a little North of the point marked "X" on the South line of the Yearsley land shown on Exhibit "1". There was a little rain water in this swale, but we crossed it and went on East about 700 to 800 feet and came to the slough, which I was unable to cross. The slough was probably about 100 feet wide and carried a swift current of Missouri River water. On East of the slough there were more willows and sandbar. The willows also run West from the slough along the South line of the Yearsley line about 1600 feet, a little over a quarter of a mile. I did not attempt to follow the slough or the river bank back up to the North property line, but came back

along the South property line the same way as I had gone out to the slough.

[fol. 56] Based on my knowledge of the river bank as it now exists, in my opinion there is approximately 95 acres less land on the East side of the Yearsley deeded land than there was in 1930.

GORDON H. HAMILTON, being first duly sworn as a witness on behalf of plaintiffs, testified in substance as follows:

Direct Examination.

My name is Gordon H. Hamilton and I am Vice-President and General Manager of the W. A. Ross Construction Company, a corporation; that said construction company owns the boats "Judge Ross" and "Witoma" and that said boats are operated by a paddle wheel on the rear end.

M. A. PAULEY, being first duly sworn as a witness on behalf of plaintiffs, testified in substance as follows:

Direct Examination.

My name is M. A. Pauley, age 41 years, and I have lived at Nebraska City for about 13 years. I began to work for the Ross Construction Company the first year they came up to Nebraska City in 1933 and quit working for them about Christmas time in 1935. I was working for said construction company in 1934, running the stern engine on a pile driver in the vicinity of the Yearsley land. I worked on a dike that began on the Iowa side and extended almost out to the Yearsley land, at times so close that they could not get a boat through. The North side of the dike was screened with lumber mat boards about half way across from the Iowa shore. Screening a dike keeps some of the water from going through it. When I quit working around Christmas time in 1935, the main part of the channel of the Missouri River was running around the end of the dike near the Yearsley land. The paddle wheels on the boats "Judge Ross" and "Witoma" were about 12 feet in diameter. I saw the "Judge Ross" washing out land at the end of the dike. It was anchored to the bank on the

Nebraska side with the back of the boat toward the bank and the force of the water from the paddle wheel would wash the bank down, and the dirt would fall in and the river would wash it away. I saw this paddle washing done more than once. I saw it done with reference to the [fol. 57] Yearsley land practically every day. They would wash out some land, then lengthen the dike out, then wash some more and then lengthen the dike some more. There was blue grass, sweet clover and some willows on the land that was being washed into the river.

Cross-Examination.

About 400 feet of the dike was already built when I began working on it. I do not remember the number of the dike I worked on, but I worked on that same dike about four months. When I quit working on the dike, it was long enough that they had to wash and at that time it was about one mile and a quarter long. Very little water went through the screened portion of the dike. The screening was made by 1 x 4" mat boards nailed together leaving square openings about 2" in size and was placed on the upper side of the dike below the water line with the top of the screening about 4 feet from the top of the piling. The half that was screened was next to the Nebraska side. The Iowa side was not screened. I saw the Government inspectors down on the work all of the time I was working there.

ALBERTA YEARSLEY, being first duly sworn as a witness on behalf of plaintiffs, testified in substance as follows:

Direct Examination.

My name is Alberta Yearsley, 20 years of age, and I am a daughter of Lawrence Yearsley, one of the plaintiffs to this action, and live at home with my parents. We moved back to this land in February, 1928,—it must have been 1930. We have lived there nearly ten years. I frequently go down to the pasture to get the cows for my father and have done so for several years. Blue grass, sweet clover, cottonwood and willows were growing on the pasture land East of the deeded land and toward the river. I have never seen the pasture land under water until two years

ago. The character of the land that was East of where the river bank is now was sand and gumbo mixed.

ALFRED WALLEN, being first duly sworn as a witness on behalf of plaintiffs, testified in substance as follows:

[fol. 58] Direct Examination.

My name is Alfred Wallen, 76 years of age, and I have lived in Otoe County all my life. I have been engaged in farming all my life until late years when I have just been a feeder and stock raiser. I own 400 acres of land in Otoe County, Nebraska. I have been going down to the Yearsley farm since 1929 to buy cattle and frequently go down there three or four times a year. The last time I was down to the Yearsley farm was about six months ago. I bought cattle from Mr. Yearsley in either 1933 or 1934—I think it was 1933. On that occasion we went out to his pasture by following the road leading East from the buildings along the North property line. We went through the pasture and over to the South fence line and followed it clear out to the Missouri River to look at the cattle as they were drinking out of the river at the time.

I know where the timber started in the pasture East of his farm land and the cattle and horses were East of the cultivated land. We crossed a strip of blue grass about 25 rods wide and North of the blue grass was some sweet clover. After we left the blue grass we walked about 70 rods on East to the cattle at the river. After we went through some timber we came to a piece of farm land or clearing that was in corn, comprising about 18 to 20 acres. The corn looked to me as if it would go about 35 to 40 bushels per acre. When I was down to the Yearsley place in 1936 the river had moved West from where it was in 1933 and we could not go out as far as we did before to get the cattle.

There was blue grass pasture about ¾ of a mile East of the Yearsley buildings. It was a piece which began at the North edge of the Yearsley land and was about 30 rods wide East and West and about 100 rods long North and South. This was a good stand of blue grass when I was down in 1934. In my opinion the fair and reasonable cash

market value of this blue grass pasture in 1934, 1935, 1936 and 1937 was $50.00 per acre. The sweet clover ground was South of the blue grass and a little further East and was about 40 rods East and West and about 60 rods long North and South. It was a fair stand of sweet clover and in my opinion the fair and reasonable cash market value [fol. 59] of the sweet clover ground in 1934, 1935, 1936 and 1937 was $40.00 per acre. The 18 to 20 acre patch of corn land in the clearing was about 50 feet southeast of the sweet clover and in my opinion the fair and reasonable cash market value of this corn land in 1934, 1935, 1936 and 1937 was $45.00 per acre.

Cross-Examination.

I live in the western part of Otoe County, Nebraska about 39 miles from the Yearsley land. The patch of blue grass which I saw in 1933 was about the same size when I saw it in 1934. It could have been a rod or two wider or longer, as blue grass spreads. The sweet clover was South and East of the blue grass and the corn patch was between the sweet clover and the South fence line. The sweet clover patch was about the same size in all of the years 1934, 1935, 1936 and 1937. The blue grass patch was also about the same size in all of those years, as there wasn't a great deal of difference. I have not been down to the Yearsley land yet this year.

Redirect Examination.

I noticed the river was farther West by a good many rods in 1935, 1936 and 1937 than it was when we walked out to look at the cattle in 1933 or 1934. The pasture extended out to where the river was; he had that all in pasture clear out to where the river was because the cattle were drinking out of the river. It was a good 50 rods West of where it had been at that time.

Recross Examination.

In 1935 and 1936 the river had receded back to the West about 50 rods, but the sweet clover patch was about the same size in 1937 as when I saw it in 1934 and the blue grass was also about the same size.

ED SOUTH, being first duly sworn as a witness on behalf of plaintiffs, testified in substance as follows:

Direct Examination.

My name is Ed South and I live in Nebraska City. I have been engaged in the saw milling business and own and operate four saw mills in the vicinity of Nebraska City. I have bought and sold cottonwood trees in 1936 and 1937. I buy the trees mostly as standing timber and then saw it [fol. 60] up into lumber. In my opinion the fair and reasonable cash market value in June, 1937 of cottonwood trees from 30 to 45 feet high, two and one-half feet in diameter and from which a 16 to 20 foot cut of lumber could be obtained, would be about $2.75 per tree.

Mr. Van Pelt: Plaintiff rests.

Thereupon at the conclusion of plaintiff's case the defendant, W. A. Ross Construction Company, moved for a directed verdict as follows:

"Mr. Rogers: At the conclusion of the evidence offered on behalf of plaintiffs, the defendant, W. A. Ross Construction Company, moves the Court to direct the jury to return a verdict in favor of that defendant for the reason that under the pleadings, the law and the evidence, the plaintiffs have failed to establish a cause of action for damages against that defendant for (a) the alleged cutting of timber; (b) the alleged flooding of land in controversy; (c) for the alleged taking or washing away of land in controversy.

The Court: Overruled, and exception allowed to Defendant."

Defendant's Evidence.

Thereupon to sustain the issues on its part, the defendant, W. A. Ross Construction Company, offered the following evidence, to-wit:

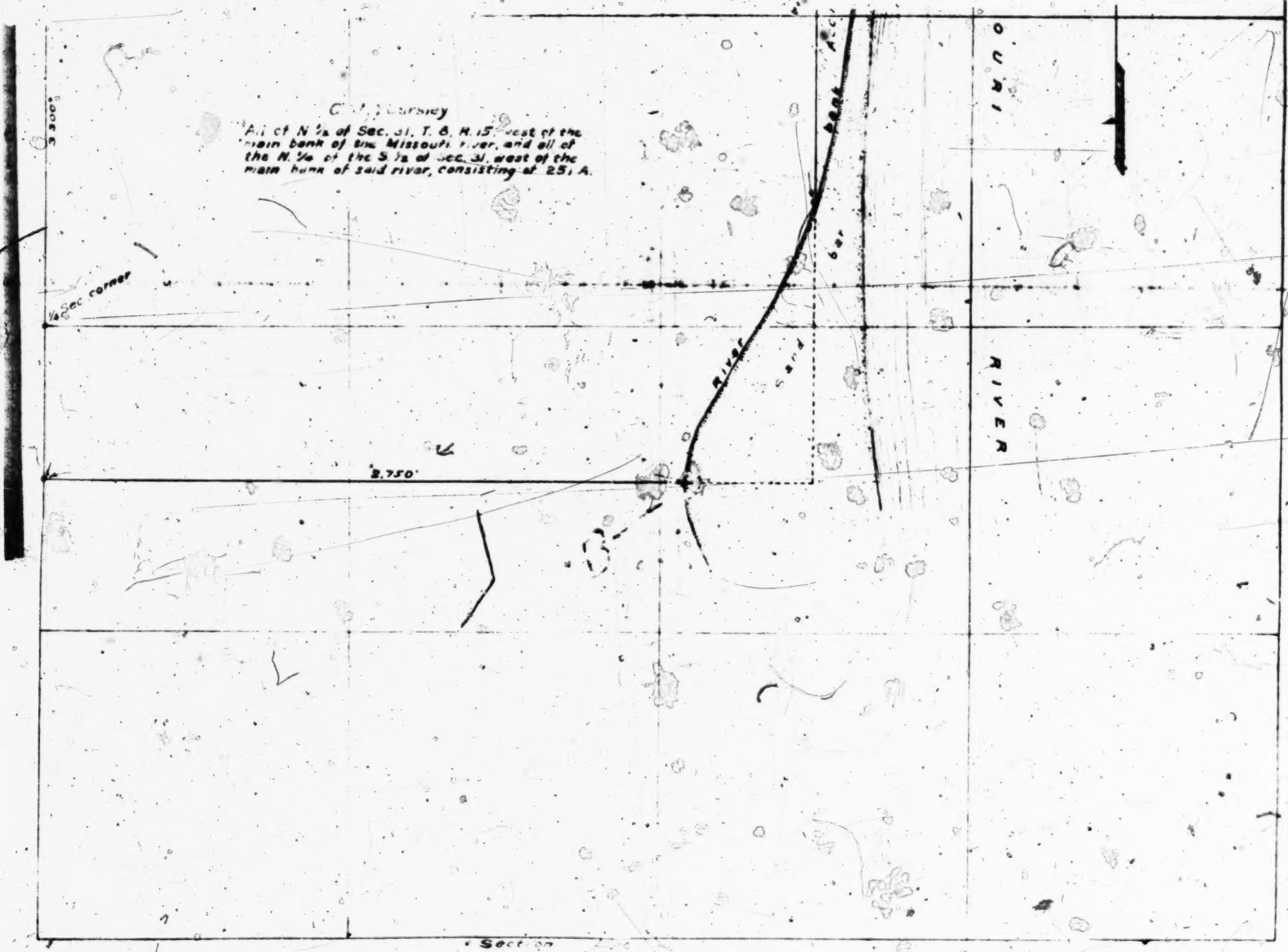
CHARLES A. SHANNON, (being the same person who previously testified on behalf of plaintiffs) being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

I prepared Defendant's Exhibit "2", which is a drawing of Section 31, Township 8, Range 15, in Otoe County, Nebraska, showing the Yearsley land and the location of the West bank of the Missouri River with reference thereto on June 24, 1923 when I made my survey at that time. The circle marked with the letter "A" on said exhibit is the northeast corner of the Yearsley deeded land and on June 24, 1923 the West bank of the Missouri River was 222 feet East of said Northeast corner of the deeded land. The circle marked with the letter "B" on said exhibit is the point where the West bank of the Missouri River intersected the South line of the Yearsley land on June 24, 1923 and is a distance of 550 feet West of the southeast corner of [fol. 61] the Yearsley deeded land. The line marked "River bank, June, 1923" shown on said exhibit was located from measurements made by me at the time of said survey and represents the location of the West bank of the Missouri River with reference to the Yearsley land on June 24, 1923. There was water running next to the West bank of the river shown on said exhibit and out in front of the water was a low sandbar.

Defendant's Exhibit "2" offered and received in evidence. The original of said exhibit being attached to this Bill of Exceptions, and the following is a blueprint copy thereof.

Defendant's Exhibit 2.

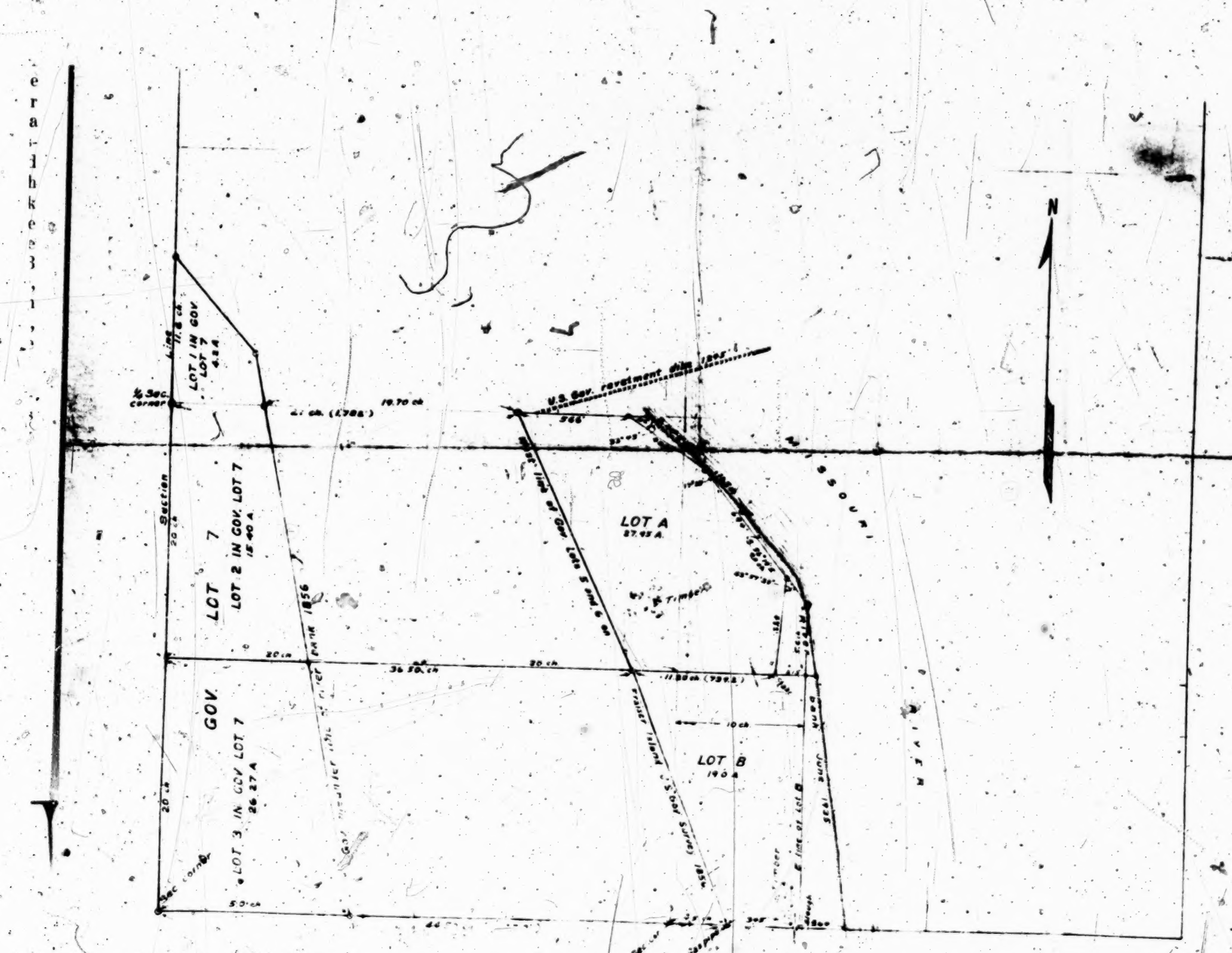


Sec. 31-18-R15

I hereby certify that on June 24, 1925 I surveyed the land more particularly described and platted on the above survey and plat.

[fol. 63] I also prepared defendant's Exhibit "3" which is a drawing of Section 30, Township 8, Range 15 in Otoe County, Nebraska lying immediately North of and adjacent to Section 31, Township 8, Range 15, in which the Yearsley land is located. The survey from which said Exhibit was prepared was made by me on June 11 and 12, 1935 and the South line on said Exhibit is the North line of the Yearsley land. The northeast corner of the Yearsley deeded land is marked on said Exhibit "3" with a circle and the wording "NE corner of Yearsley deeded land". That at the time of said survey on June 11 and 12, 1935 the West bank of the Missouri River was 260 feet East of the northeast corner of the Yearsley deeded land. Said Exhibit shows where a slough or low ground crosses the North line of the Yearsley property at the northeast corner of the Yearsley deeded land and this slough runs in a generally North and South direction. A comparison of the location of the West bank of the Missouri River in June, 1935 and in June, 1923 can be obtained by placing said Exhibit No. 3 immediately above said Exhibit No. 2 so that the South line of Exhibit No. 3 and the North line of Exhibit No. 2 will parallel each other, as they are the same identical line, and this comparison shows that the West bank of the Missouri River in June, 1923 was 38 feet nearer to the northeast corner of the Yearsley deeded land than it was in June, 1935.

Defendant's exhibit No. 3 offered and received in evidence, the original of said exhibit being attached to this Bill of Exceptions, and the following is a blueprint copy thereof:



Sec. 30 - T8 - R.15

OTOE COUNTY, NEBR.

I hereby, certify that I have surveyed Lots A and B in Sec 30 T 8, R 15 Otoe County according to the above plat, said survey having been made on June 11 and 13 1935, and that said survey and the above plat drawn by me are correct.

Defendant's Exhibit 3.

N

LOT 1 IN GOV LOT 7
4.84

¼ Sec Corner

U.S. Gov. revetment dike 1895

LOT 2 IN GOV. LOT 7
15.40 A

LOT 7

Section

LOT A
27.93 A

GOV. LOT 7
26.27 A

LOT B
190 A

Scale 1" = 400'

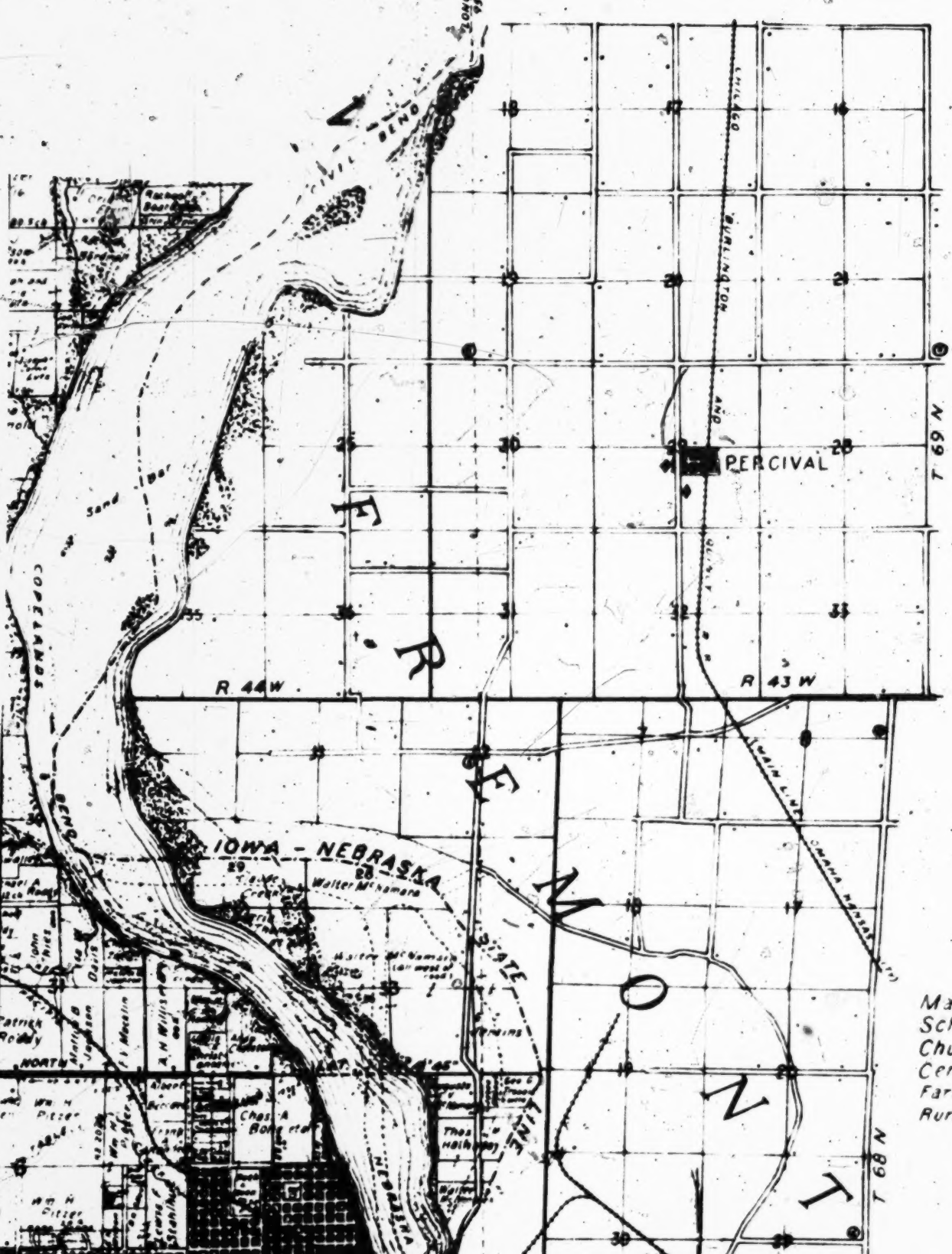
Defendant's Exhibit 5.

Timber

[fol. 65] Defendant's Exhibit "4" is a printed copy of a map of Otoe County, Nebraska, which was prepared by me from Government field notes and all records available in the offices including my own surveys and was published by me in 1929 as an official map of Otoe County, Nebraska, and shows the location of the Yearsley land in Section 31, Township 8, Range 15. Defendant's Exhibit "4" was offered and received in evidence, the original of said exhibit being attached to this Bill of Exceptions, and the following is a photostatic copy of that portion of said exhibit showing the eastern part of Otoe County adjoining the Missouri River and including the Yearsley land:

Defendant's Exhibit 4.

MAP OF OTOE COUNTY NEBRASKA.



DRAWN AND PUBLISHED BY
C. A SHANNON
COUNTY SURVEYOR
NEBRASKA CITY, NEBR.

1929

SCALE 1 INCH - 4,000 FEET

LEGEND

Main Highways	
Schools and Number of School District	⑫
Churches	
Cemeteries	†
Farm houses	•
Rural mail routes	-------

FOUR MILE
COUNTY
MISSOURI RIVER
MINERSVILLE
IOWA
STATE LINE
MISSOURI
R 43 W
T 67 N
T 67 N
True North
Magnetic North
Var 0°30'
NEBRASKA CITY JUNCTION
LONGITUDE
FRAZERS MEANDER BEND
Elizabeth A Wikman et al
Fred Stahlhut
Henry Heesch
Rosa Sand
Theo A Gress
Jessie T Gregg et al
Dorothy K Schneider et al
Elizabeth Roll et al
John Schnitzer
Rosalia Zeiner
Frank J & Carl Kressen
Ernest Glochel
Emma M Wichherst et al
Sarah Wichherst et al
Jennie Fraser
Carl Mulze
Joe Gaehl
John M Swanson
Minnie Carstens
David B Shellenberger
Mary A Overton
Bessie M Thornton
Peter Herzog
Carl P Overton
Geo S Overton
Grace P Overton
Allan B Wilson
Fred W Hobel
Robt L Davis
Lawrence Casper
J Kasner
Daniel W Livingston
Ernest Glenzel
Howard H Hawks
Web City Nat Bank
Sarah E Clayton
Max Fenske
Joseph Shellenberger
Richard A Warner
Ernest Burger
Fred Oelke
Henry W Tegtmeyer
Joseph A Hamma
Marvin J Warner
Mary J Sayers
James Rowan et al
Frank E Coe
John Church
Martha W Davis et al
Albert A Schindler
Albert A Schneider
Laura Wiehe Compton et al
Edwards
Chas W Cohn
Addie Conklin
Albert Hedrick
Frank B Haggville
Clara E Foote
Alfred E Foote
Geo Oelke et al
Wm A and Herman A Lyon
Mary Snyder
Mary Snyder
Mary Snyder
Joseph R Francois
Frank B Hall et al
Thomas A Sherer
Walter W Neary
Fred Wurr
Anna C McCord
Jessie T Gregg et al
Dorothy K Schneider et al
Rosalia Zeiner
Joseph Gress
Richard Gress
Rosalia Zeiner et al
Emma M Wichherst et al
Minnie Oelke et al
David B Shellenberger

[fol. 67] I prepared defendant's Exhibit No. 5 which is a drawing of Section 31, Township 8, Range 15, in Otoe County, Nebraska, showing the Yearsley land. Said exhibit is drawn to the scale shown thereon and was prepared by me yesterday from the measurements and field notes made at the times of my prior surveys and from the measurements and field notes which I took when I went upon said premises on the morning of May 19, 1938, after having previously testified in this case on behalf of plaintiffs. The 250 acre tract of deeded land is inclosed by the heavy black lines in the northwest portion of the drawing. The point on the North line of the exhibit marked "3267' E, 1912" represents the intersection of the West bank of the Missouri River with the North line of the Yearsley property according to my 1912 survey of said premises. The line across said premises marked "Bank, 1917" represents the meander line of the West bank of the Missouri River according to my survey in 1917. I located the West bank of the Missouri River at the North and South lines of the Yearsley property in 1912, and meandered the river bank across said premises in 1917. Beginning at the northeast corner of the drawing in 1917 the river bank took a southwesterly course and intersected the South line of the Yearsley property approximately 1300 feet West of the southeast corner of the Yearsley deeded land. In 1917 there was approximately 1300 feet of the Yearsley deeded land at the southeast corner which was in the river.

The marking "Opening Through" on the South line of said drawing represents the location of a path at the present time cut through the willows on the Yearsley land and has stakes placed along it. On my survey yesterday morning I found that a distance of 3150 feet East of the southwest corner of the Yearsley deeded land was a low swale with a little water standing in it. It was about 75 to 80 feet wide. I could not see up this swale very far on account of the heavy growth of willows, but as far as I could see it appeared to be the same width and depth as at the South property line.

I have surveyed the meanderings of the Missouri River for thirty years and know the general course of the river in this vicinity during that time. I am familiar with the marks

the river leaves in its meanderings back and forth and [fol. 68] it is my opinion that the West bank of this swale was the West bank of the Missouri River in 1928 and I could see up the swale about 200 feet. The slough which intersects the South line of the Yearsley property is marked with a blue pencil on Exhibit "5" and is 980 feet East of the East line of the Yearsley deeded land at the present time and beyond East of the slough is sandbar covered with willows. Between the slough and the East line of the deeded land the growth is all willows from 2 to 3 inches in diameter and from 15 to 20 feet high, and West of the East line of the deeded land to the place marked "Opening Through" on the drawing it is also all willows.

The willows extend on West from the East line of the deed land a distance of 600 feet West, where there is a clearing which at the present time is covered with a dense growth of volunteer wheat. The width of the clearing is about 650 feet and it is about 2200 feet from the West side of the clearing on said drawing East to the slough.

Defendant's Exhibit No. 5 offered and received in evidence, the original of said exhibit being attached to this Bill of Exceptions, and the following is a blueprint copy thereof:

[fol. 70] Along the East line of the Yearsley deeded land there is a rich heavy gumbo soil. A well defined bank extends in approximately a North and South direction across the entire 250 acre deeded tract, the ground to the West being from 3 to 4 feet higher than to the East. The ground to the East of this bank is covered with timber and other growth except for the clearing shown on Exhibit "5". There were no crops or cultivated land East of the East line of the deeded land in 1938 or at the time of my survey in 1935. There were no crops East of the timber line shown on Plaintiff's Exhibit "1" at the time of my survey in 1928 or at the time of any of my surveys since that time nor at the time of my survey in June, 1923.

The circle in red on Exhibit "3" with an arrow pointing toward it and marked the Northeast corner of Yearsley deeded land does indicate the true position of the Northeast corner of the Yearsley deeded land. Said Exhibit "3" correctly shows the location of the West bank of the Missouri River as it was on June 11 and 12, 1935. It was then 260 feet East of the Northeast corner of the Yearsley deeded land.

On Exhibit "2" the circle in brown pencil represents the Northeast corner of the Yearsley land in 1923. It was 222 feet from the Northeast corner of the Yearsley deeded land to the West bank of the river on June 24, 1923. The bank at that time is represented by the dark line having the following words on it, "Bank June, 1923". At that time the bank was 550 feet West of the Southeast corner of the Yearsley deeded land and at that time there was a sandbar East of the West bank of the river and there was no water on it.

I saw no crops whatever along the North side of the Yearsley land East of the timber line at the times of any of my surveys which I have ever made on said premises.

I also surveyed the Yearsley land in 1912 at the time Mr. Yearsley's father bought the land and at that time the West bank of the Missouri River was partly or wholly West of the East line of the Yearsley deeded land. The river itself was back on a portion of the 250 acre deeded tract along the East side thereof at the time of my 1912 survey.

[fol. 71] Cross-Examination.

I saw some blue grass and blue stem along the North end of the Yearsley property East of the deeded land, but I never saw any sweet clover there. There was about 30 to 35 acres between the East line of the deeded land and the 1928 river bank shown on Exhibit "1". Where the willows were growing along the South side of the Yearsley land, it was all gumbo soil—heavy black loam, characteristic of river deposit. It appeared to be a little lighter and [sander] soil nearer the river. The land which was sandbar in 1923 and so marked on Exhibit "2" along the South line of the Yearsley property is now heavy rich soil covered with willows and some of it under cultivation. The river has constantly built to the East since 1856.

The swale which I mentioned in testifying concerning Exhibit "5" had just a little water in it. There was not 70 to 80 feet of water in it. 70 to 80 feet was the distance from the top of the extreme banks of the swale. You could walk right across the bottom of the swale; from the swale on East clear up to where I struck the slough the heavy black gumbo continued, a little [sander] as I approached the river, but it was good rich soil. South of the Yearsley line fence the land was being tilled.

Redirect Examination.

The gumbo deposits above mentioned were the result of flooding and overflowing of the land, as that is the only way it could get there. There has been some shifting of the river back and forth since 1856 as shown by my various surveys.

Recross Examination.

The river bank in 1917 as marked on Exhibit "5" is at a point further West than the river bank in 1923 as marked on Exhibit "2". The bank in 1928 as shown on Exhibit "1" and on Exhibit "5" is at a point farther East than the river bank in June, 1923 as shown on Exhibit "2".

Gordon H. Hamilton, being first duly sworn as a witness on behalf of defendants, testified in substance as follows:

[fol. 72] Direct Examination.

My name is Gordon H. Hamilton, living at Kansas City, Missouri, and I am Vice-President and General Manager of W. A. Ross Construction Company, defendant in this action. I have held that position during the time my company was working on the Missouri River at Nebraska City and in the vicinity of the Yearsley land. Defendant's Exhibit No. 9 is one of the contracts entered into between Ross Construction Company and the United States Government for doing the work of improving the Missouri River therein provided, a part of which was in the vicinity of the Yearsley land.

"Mr. Rogers: The defendant offers in evidence Exhibit Number 9.

Mr. Van Pelt: To which we object as immaterial under the issues.

The Court: Overruled.

Exception allowed to Plaintiff.

Mr. Van Pelt: Your Honor, I would like to add to that objection, if I may, that it is incompetent and immaterial under the issues in this case, and does not constitute a defense to the acts relied upon by the plaintiff in its petition.

The Court: Overruled.

Exception allowed to Plaintiff.

(Exhibit 9 received in evidence.)"

(To copy this contract in its entirety, the same consisting of ten printed pages and forty-one additional single spaced typewritten pages of detailed specifications, which are a part thereof, would be an undue encumbrance of the record in this case, and therefore only the substance of the contract is stated below, together with a copy of such provisions which are considered material to the issues in this case).

Defendant's Exhibit No. 9 is contract No. W461 eng.-5368, prepared on United States Government Form of Contract No. PWA 51 (Federal Emergency Administration of Public Works Project) between the War Depart-

ment, Engineer Department at Large, and W. A. Ross Construction Company, as contractor, for Standard Pile and/or Crib Dikes and Revetment at Nebraska, Frazers and Otoe Bends, Missouri River, and omitting signatures and such parts of the contract and specifications as are considered [fol. 73] immaterial, is as follows:

"This Contract, entered into this 13th day of September, 1933, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and W. A. Ross Construction Company, a corporation organized and existing under the laws of the State of Missouri of the city of Kansas City in the State of Missouri hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for construction of about 43,350 linear feet of Standard Pile and/or Crib Dikes and about 8,350 linear feet of Revetment in the Missouri River at Nebraska, Frazers and Otoe Bends, the center of the work being about 2 miles downstream from Nebraska City, Nebraska; for the consideration of: (here is recited a detailed statement of price per unit, i. e. per square, per cubic yard, per linear foot, etc., for each item and type of construction work covered by the contract); in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications dated August 28, 1933 and Amendment attached thereto; drawings marked: "Missouri River Improvement, Kansas City to Sioux City Standard Pile Dike", No. 200-2-5; "Missouri River Improvement Standard Willow or Lumber Mattress", No. 200-1-29; "Missouri River Improvement Standard Crib Dike", No. 200-2-6; "Missouri River Improvement Kansas City to Sioux City Standard Revetment and Pile Revetment with Lumber Mattress", No. 200-2-3; and map marked, "Missouri River, Kansas City to Sioux City", Sheet No. 49. The work shall be commenced within fifteen (15) calendar days after the date of receipt by the contractor of notice to proceed, and shall be completed as specified in paragraph three (3) of the specifications.

Art. 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Art. 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this ar- [fol. 74] ticle must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Art. 4 Changed conditions.—Should the contractor encounter, or the Government discover during the progress of the work, sub-surface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such con-

ditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

Art. 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Art. 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already com-

pleted, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

[fol. 75] (d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Art. 7. (a) Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment, which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the

contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(b) (Provides for use of Domestic materials produced, mined or manufactured in United States.)

(c) (Provides for use of NRA materials, except when contracting officer otherwise certifies.)

(d) (Gives preference to local materials, subject to determination of contracting officer.)

Art. 8. (Provides for Superintendence of work by contractor or a competent foreman.)

Art. 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. (The balance of this article provides for liquidated damages for delay in completing work and also covers circumstances where delays are excepted from the article.)

[fol. 76] Art. 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be re-

sponsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Art. 11. (a) (Prohibits convict labor.)

(b) (Provides for thirty-hour week.)

(c) (Provides for eight-hour day.)

(Art. 12. (Contractor covenants against contingent fees.)

Art. 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Art. 14. (Prohibits certain Government officials from sharing benefits of contract.)

Art. 15. Disputes.—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Art. 16. (Provides for payment to contractor as work progresses and final payment upon completion and acceptance of the work.)

Art. 17. (Requires contractor to give additional security if his surety becomes unacceptable to the Government.)

Art. 18. (Concerns wages to be paid employees.)

Art. 19. (Provides for labor preferences and manner of selecting employees.)

Art. 20. (Requires maximum of human labor in lieu of machinery wherever practicable.)

Art. 21. (Requires contractor to carry compensation insurance on employees.)

Art. 22. (Requires contractor to extend benefits of labor and wage provisions of contract to every laborer or mechanic.)

Art. 23. Inspection of records.—The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

[fol. 77] Art. 24. Reports.—The contractor will make report in triplicate monthly through the contracting officer, and cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. He shall also furnish to the contracting officer the names and addresses of all subcontractors on the work at the earliest date practicable.

Art. 25. Termination for breach.—In the event any of the provisions of articles 7(b), (c), and (d), 11, 18-24, 26, of this contract are violated by the contractor or any subcontractor on the work, the contracting officer may terminate the contract by written notice to the contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances,

and plant as may be on the site of the work and necessary therefor.

Art. 26. (Requires subcontractors to comply with all provisions of the contract affecting subcontractors.)

Art. 27. (Provides for compliance with safety laws and codes for accident prevention.)

Art. 28. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall mean the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative.

Art. 29. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

Conflicts. Whenever a conflict in provisions occurs between the specifications and amendments thereto, and United States Government Form of Contract, No. PWA 51, the provisions of United States Government Form of Contract, No. PWA 51, will govern.

The following are such parts of the specifications attached to the foregoing contract and forming a part thereof as it is deemed necessary or material to set forth in full:

"Specifications for Construction of Standard Pile Dikes, Crib Dikes & Revetment.

General

1. Location. The site of the proposed standard pile dikes and/or crib dikes and revetment is in the Missouri River at Nebraska, Frazers and Otoe Bends (Fremont County Iowa and Otoe County, Nebraska) the center of the work being about 605 miles above the mouth and about 2 miles downstream from Nebraska City, Nebraska.

[fol. 78] 2. Work to be done. The work provided for herein is authorized by the Act approved January 21, 1927

and is included in the approved program for Public works under the National Industrial Recovery Act of 1933 and consists of furnishing all labor, material, plant, equipment, machinery and fittings and therewith constructing such pile dikes and/or crib dikes and revetment as may be found necessary by the contracting officer for the improvement of the channel in the Missouri River between mile 610 and mile 597 (1890 mileage).

It is contemplated that the work required under this contract will not be less than 30,000 linear feet nor greater than 64,500 linear feet of standard pile and/or crib dikes, and not less than 5,800 linear feet nor greater than 12,500 linear feet of revetment. From present indications, it is estimated that there will be required, (a) about 24,110 linear feet of 3-row pile clump dikes with clumps spaced 18 feet on centers; about 17,640 linear feet of 2-row pile clump dikes with clumps spaced 15 feet on centers; (b) about 1,600 linear feet of crib dikes; (c) and about 8,350 linear feet of standard and/or pile revetment; but the contracting officer reserves the right to vary the spacing of clumps or piles for the pile dikes and pile revetment from 6 to 24 feet; to increase or decrease the number of rows in any part of the pile dikes and pile revetment to not more than five nor less than two; to modify the number of pile dikes and/or crib dikes, and revetment from that specified, and to vary the total length of dikes and revetment within the limits specified. The pile dikes and/or crib dikes and revetment shall be constructed in accordance with drawings referred to in paragraph 7 of these specifications.

3. Commencement, Prosecution and Completion. (a) The contractor will be required to commence work under the contract within 15 calendar days after date of receipt by him of notice to proceed, to make progress satisfactory to the contracting officer, and to complete the work within 365 calendar days after said date of receipt of notice to proceed, except as provided hereafter in this paragraph.

(b) In case the total length of dikes and revetment actually constructed under the contract exceeds the sum of the estimated lengths as stated under (a) (b) and (c) of the last subparagraph of paragraph 2, additional time will be allowed proportionally.

(c) When conditions at the site of the proposed work are considered by the contracting officer to be unfavorable to its prosecution, the contracting officer may order the contractor, in writing, to suspend a part or all of the work until reasonable conditions for prosecution of the work obtain. When all of the dikes and/or revetment work is thus suspended, the time allowed for completion of the contract will be increased by an amount equal to the time of suspension.

(d) When a portion of the dikes and/or revetment work is thus suspended or not authorized for construction by the contracting officer; the time will be increased on the basis of the proportion of the amount of the unordered or suspended portion of the dikes and/or revetment work to the total amount of the dikes and/or revetment work remaining to be done under the contract, provided that the periods of time for the dikes and/or revetment work as fixed by stop orders do not overlap. (See Article 9 of the Contract Form.)

* * * * * *

[fol. 79] 7. Contract Plans and Specifications. (a) The work shall conform to the drawings marked: "Missouri River Improvement, Kansas City to Sioux City Standard Pile Dike", No. 200-2-5; "Missouri River Improvement Standard Willow or Lumber Mattress", No. 200-1-29; "Missouri River Improvement Standard Crib Dike", No. 200-2-6; "Missouri River Improvement Kansas City to Sioux City Standard Revetment and Pile Revetment with Lumber Mattress", No. 200-2-3; "Missouri River Improvement Kansas City to Sioux City Standard Revetment and Pile Revetment with Willow Mattress", No. 200-2-4; and map marked, "Missouri River, Kansas City to Sioux City", Sheet No. 49, all of which form a part of the specifications, and which are filed in United States Engineer Office at 707 Postal Telegraph Bldg., Kansas City, Missouri.

(b) Bidders are expected to visit the locality of the work, and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather and other contingencies.

(c) The specifications give in general the character of work required, methods of construction and material to be used. In the contract the specifications and plans are to be interpreted as mutually explanatory and supplementary and therefore any feature shown on one and not on the other shall have the same force and effect as if shown on both.

(d) It is the spirit and intent of these specifications and plans to secure for the United States the work described, complete in every respect, and the general conditions thereof shall be complied with, whether items are specifically mentioned or not.

* * * * * *

VI. Pile Dike Construction

25. (a) Clump dike construction. Piles shall be driven in clumps, three piles constituting one clump, to a minimum penetration of 20 feet below the foundation mattress, except the piles in the last 100 feet of all dikes which shall have a penetration of 30 feet below the foundation mattress. The contracting officer reserves the right to vary the required penetration, and such variation shall not validate any claim of the contractor to increased payment except that additional length of piles actually installed shall be paid for at the unit price bid. The piles of each clump shall be driven so that the maximum spread at the mattress line shall be obtained, having regard to depth of water and the resulting strength of structure. The rows of clumps shall be driven straight and such distance apart that the stringer will lie solidly against each contiguous clump. The distance between the pile clumps in each row shall be from 15 to 24 feet, as directed by the contracting officer. The inshore end of each dike shall begin at a point not more than 60 feet riverward from the top of the paved bank slope. The piles in each clump shall be drawn together and fastened with seven turns of 3/8" strand, each turn being drawn taut by mechanical power and fastened with two boat spikes on opposite sides of the clump. Each boat spike shall be driven to a depth of 4½ inches and the remaining length shall be bent over the strand and forced down into the pile. The ends of the strand shall be fastened with two boat spikes as shown on the drawing. Start-

ing at the inshore end the piles shall be driven, or cut off, [fol. 80] to elevations as directed by the contracting officer. To avoid cupping and splitting of pile butts a cast steel driving plate or cap shall be used on all dike construction.

If the contracting officer orders portions of any dike constructed to difference elevations the work will be in accordance with drawing designated, "Missouri River Improvement Detail of Authorized Use of Blocks in Pile Clump Dike Construction", No. 200-1-35.

(b) Clump brace dike construction. Where the river bed along the proposed dike line has a silt deposit of from 8 to 20 feet in depth over-laying rock and the minimum penetration for piles of 20 feet below the foundation mattress cannot be obtained, the standard pile clump brace dike shall be constructed, unless otherwise directed by the contracting officer. Three rows of clumps, spaced as directed by the contracting officer, shall be driven; the first and second row of clumps shall be staggered ½ the clump spacing, and such distance apart between the rows that a stringer can be placed solidly against each contiguous clump; and the third row of clumps shall be driven 30 feet downstream from the structure azimuth line. Each clump shall be placed and fastened in accordance with the preceding paragraph. The second row of clumps shall be driven along the dike axis. Between the first and the third row of clumps and at the angle to the structure azimuth line, as directed by the contracting officer, a brace pile shall be placed at each clump so that the small end of the pile shall rest on the up-stream stringer in contact with each clump and the butt end of the brace pile shall be forced against the downstream pile of each clump of the third or downstream row of clumps at the mattress line. To guide the brace pile to position, two 2" x 12"-x4' planks shall be spiked to the brace pile, one parallel to the other, with three 3/8" x 6" boat spikes per plank. The brace pile shall be fastened to the upstream stringer and one pile of each clump of the first row of clumps with three turns of 3/8" strand, per fastening; each turn of strand shall be

drawn taut by mechanical power and fastened with a boat spike and the strand ends fastened with two boat spikes.

(c) Single Pile Dike Construction. Single pile dikes will be constructed in lieu of 2-row pile clump dikes, as directed by the contracting officer, when top of bar to top of pile is 6 feet or less. Piles for single pile dikes shall be driven in single rows to a minimum penetration of 20 feet below the foundation mattress. The contracting officer reserves the right to vary the required penetration, and such variation shall not validate any claim of the contractor to increased payment except that additional length of piles actually installed shall be paid for at the unit price bid. The rows of piles shall be driven straight and such distance apart that the stringers can be placed solidly against each contiguous pile. The distance between the piles in each row shall be from 6 to 12 feet, as directed by the contracting officer. Alternate rows of piles shall be staggered one-half the pile spacing. The piles shall be driven, or cut off, to elevations as directed by the contracting officer.

* * * * * *

(e) Stringers. Stringers shall be of such length as to span at least 3 clumps in one row for the clump dikes or 3 piles in the single pile dikes. They shall be placed between adjacent rows of clumps or piles and driven tight with the pile driver hammer. To make the stringers continuous throughout the length of each dike, they shall be lapped 6 [fol. 81] feet by placing the large end of one over the small end of the adjoining stringer, and laps shall be shifted to break joints in adjacent rows. The lap shall be at a clump or pile, and so located that 3 feet of the lap extends on each side of the center line of the clump or single pile. Each end of the lap shall be fastened with 3 turns of 3/8" strand. The stringers shall be fastened to the contact pile of each clump or pile with 3 turns of 3/8" strand. Each turn of strand shall be drawn taut with mechanical power and fastened with one boat spike per turn, and the strand ends shall be fastened with at least two boat spikes. The strands shall be fastened to the contact pile with two boat spikes, one at the top and one at the bottom of the strands.

The small end of the last channelward stringer, of each row, shall be lapped over the small end of the small end of the adjoining stringer for such distance as to span at least two clumps or piles in the same row. The butt end of each last stringer shall project into the dike terminal.

Where the standard brace pile dike is constructed the stringers for the upstream rows shall be placed in accordance with the preceding paragraph. A row of stringers will be placed on the downstream row at the same elevation as the stringers in the upstream row. The stringer laps and fastenings shall be in accordance with the above paragraph.

* * * * * * *

XVI. Conduct of Work.

51. Order of Work. (a) The work is to be carried on at such localities and also in such order of precedence as may be found necessary by the contracting officer.

(b) It is contemplated that the work for each section of standard and/or pile revetment will be carried on continuously from the head downstream and that the work for dikes of each continuous system, will proceed in general from the upstream dike downstream; that no dike will be built to a length exceeding the length to which any dike upstream therefrom has been built, pending completion of all such upstream dikes. Departure from this procedure will be only on written authority from the contracting officer.

(c) The location, elevation, mean low water line and limits of the work will be plainly indicated by the contracting officer or his agents by stakes, ranges, or otherwise.

* * * * * * *

55. Obstructing Navigation. The contractor must not obstruct navigation, but must so dispose his plant and regulate his work as to afford every possible facility to navigation, in all cases, subordinating his own interests and convenience, and he shall follow such instructions as

may be given by the contracting officer to adjust any conflict in this regard that may arise, subject to the provisions of the contract.

XVII. Supervision.

56. Inspection. (a) The work will be conducted under the general direction of the contracting officer, and will be inspected by inspectors appointed by him, who will enforce a strict compliance with the terms of the contract.

[fol. 82] (b) The inspectors shall at all times be given access to the work and full facilities for examination of materials and workmanship. They shall have power to reject articles, workmanship, materials or supplies which do not conform to specifications and plans. Articles, materials, or supplies on rejection by an inspector shall be kept out of or removed from the finished work by the contractor.

(c) A first inspection of the quality of materials will be made by the United States inspector, as directed by the contracting officer, subject to final inspection as placed in the work. The quality of workmanship will be under inspection at all times during the progress of work. Piles broken in driving or clumping and mattress damaged or lost during construction or in sinking, shall be replaced by the contractor at his own expense.

(d) Inspectors will measure and record the work done, the quantities and qualities of materials received and placed, and will render daily reports thereon to the contracting officer. The contractor, upon request, may be furnished by the inspector with a copy of such part of the reports as pertain to the work done, or materials received and placed.

(e) The presence of the inspectors will not relieve the contractor, his agents or employees from any responsibility for the proper execution of the work.

* * * * * *

60. Liability of the Contractor. (c) The United States will not secure nor lease land necessary for the contract-

or's use, nor be responsible for trespassing upon or injury to private lands or other property by the contractor or his employees.

(d) Flood stages on the Missouri River usually occur in April and June. Precautions shall be taken at all times to safeguard plant, materials, and unfinished construction work against swift current, floating drift, erosion, and sudden rises that may overtop the banks.

* * * * * *

62. Modifications. The right is reserved to make such changes in the execution of the work to be done under these specifications as in the judgment of the contracting officer may be necessary or expedient to carry out the intent of the contract, provided that the unit cost to the contractor of doing the work shall not be increased thereby; and no increase in unit price over the contract rate will be paid to the contractor on account of such changes. No change which will materially affect the cost of doing the work will be made, and no greater or less unit price than the contract rate will be paid, except upon formal written agreement between the parties, as provided in the form of contract to be entered into. (See Articles 3, 4 and 5 of Standard Government Form of Contract.)"

Defendant's Exhibit No. 10 is a second contract entered into between Ross Construction Company and the United States Government for doing river improvement work in the vicinity of the land in question.

[fol. 83] "Mr. Rogers: We offer in evidence Defendants Exhibit No. 10.

Mr. Van Pelt: To which we object as incompetent, for the further reason that it is immaterial under the issues in the case and no proper defense to the acts of alleged improvement.

(Proof of the genuineness of the signatures to both contracts, Exhibits No. 9 and 10, waived.)

The Court: Then I will overrule the rest of the objection.

Exception allowed to Plaintiff.

(Exhibit Number 10 received in evidence.)"

Defendant's Exhibit No. 10 is ER contract No. W425 eng.-283-5, prepared on the same form of contract as was used for Exhibit No. 9, except as modified and approved by the Works Progress Administrator, and is between the War Department, Engineer Department at Large, and W. A. Ross Construction Company, as contractor, for the construction of Standard Pile Dikes and Revetment on the Missouri River at Otoe and Hamburg Bends, and is dated July 11, 1935. There is no material difference between the provisions of the two contracts, Exhibits Nos. 9 and 10, except that in the later contract the NRA provisions have been stricken and there have been certain modifications of the labor, wage and hour provisions, otherwise there are no material changes in the provisions of Exhibit No. 10 from the portions of Exhibit No. 9 hereinbefore quoted, and, therefore, only the following portions of Exhibit No. 10 are set forth:

"Article 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for the construction of about seven thousand four hundred ninety (7,490) linear feet of 3-row pile clump dikes with clumps spaced 18 feet on centers; about eleven thousand nine hundred eighty-five (11,985) linear feet of 2-row pile clump dikes with clumps spaced 15 feet on centers; about five hundred twenty-five (525) linear feet of 2-row single pile dikes; and about two thousand seven hundred twenty-six (2,726) linear feet of standard and/or pile revetment, in the Missouri River at Otoe and Hamburg Bends, the center of the work being about 599.3 miles above the mouth and about 1.5 miles upstream from Minersville (Otoe City), Nebraska; for the consideration of (on a per unit basis similar to Exhibit No. 9) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications dated June 25, 1935; Addendum No. 1

to specifications dated July 1, 1935; Addendum No. 2 to specifications dated July 6, 1935; and Drawings designated in paragraph 7 of the specifications.

* * * * * * *

[fol. 84] Specifications for Construction of Standard Pile Dikes and Revetment.

I. General

7. Contract Plans and Specifications. (a) The work shall conform to the drawings marked: "Missouri River Improvement, Omaha District, Standard Pile Dike," No. 200-3-1U; "Missouri River Improvement, Omaha District, Standard Pile Clump Trail Dike," No. 200-3-2U; "Missouri River Improvement, Omaha District, Standard Longitudinal Pile Dike," No. 200-3-3U; "Missouri River Improvement, Omaha District, Standard Revetment and Pile Revetment with Lumber mattress," No. 200-3-5U; "Missouri River Improvement, Omaha District, Standard Willow or Lumber Mattress," No. 200-3-8U; and map marked "Missouri River, Kansas City to Sioux City," Sheet No. 48, all of which form a part of the specifications, and which are filed in the United States Engineer Office, Missouri River Division, 707 Postal Telegraph Building, Kansas City, Missouri, where they may be seen by interested parties.

XV. Miscellaneous Provisions.

49. Damage. Damage to Government property due to failure of the contractor to take reasonable precaution, and all loss or deterioration of or damage to the permanent work by flood, accident, or exposure prior to final acceptance, shall be made good by the contractor without expense to the United States. He will also be held responsible for any damage done to adjoining property through his neglect or failure to protect the work properly.

Direct Examination (Continued).

Following the execution of the contract Exhibit No. 9, Ross Construction Company received defendant's Exhibit

No. 11 in the due course of the mails. Exhibit No. 11 offered.

"Mr. Van Pelt: All right, we object to defendant's Exhibit Number 11 for the reason that it is immaterial under the issues of this case, and in no way is it shown by the Exhibit that it has anything to do with the property in question of the plaintiff; for the further reason that it is entirely immaterial so far as the damage that has been done to plaintiff's land is concerned, and any orders from the War Department or any other Departments would not constitute a defense to this action, no emergency of war or riot having been shown; for the further reason that it is not the best evidence, no proper and sufficient foundation laid; and in that connection I will say that the objection does not go to the signature of Theodore Wyman, Junior, which appears on the third page, and we are not asking for proof of the genuineness of Mr. Wyman's signature. And I understand that the map is not being offered, be-
[fol. 85] cause I have separate objections to make to the map. And may I add to that objection, Your Honor, for the further reason that the reception in evidence of the Exhibit so far as it tends to prove a right on the part of the defendant, if any, to destroy plaintiff's property is in violation of his constitutional right as to having his property taken without due process of law.

The Court: Overruled. I think that I will reserve final ruling on the proposition I think you have behind the proposition here until we get this evidence in.

Exception allowed to plaintiff."

(Exhibit No. 11 is a letter dated September 28, 1933 written on the stationery of War Department, United States Engineer Office, Kansas City, Missouri, from Theodore Wyman, Jr., Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting the formal parts and such portions as are immaterial to this case, is set forth below):

"Under your contract No. W461eng.—5368) for dike and revetment construction in the Missouri River at Nebraska, Frazers & Otoe Bends, you are ordered to construct the following:

Right Bank

Dike No.	Length	Sta. to Sta.	Strength	Pene.	Elev.	Matt.	Termi
602.3	3210′	Standard revetment to be built when river erodes bank line to proper location and as directed by the Area Engineer.					
601.5	1130′	2+00 to 13+30	3-row 18′	30′	911.0	90′	36 P
		Left Bank					
602.7	1985′	1+25 to 16+10	2-row 15′	20′	910.5	77′	
		16+10 to 18+60	3-row 18′	20′	910.5	77′	
		18+60 to 21+10	3-row 18′	30′	910.5	77′	36 P.
602.7-A	1465′	(0+00 of trail= 18+60 of main) to 6+15	2-row 15′	20′	910.5	90′	
		6+15 to 14+65	3-row 18′	30′	910.5	90′	36 P.
601.9	3730′	2+60 to 34+90	2-row 15′	20′	909.7	77′	
		34+90 to 39+90	3-row 18′	30′	909.7	77′	36 P.

* * * * * Probings will be taken by the contractor before starting construction so that the type and strength may be determined. Pile penetration of these dikes will be maximum obtainable up to 30 feet. When the channelward end of the dike is a crib structure no terminal will be built.

After each 36 pile terminal has been completed in accordance with the plan and specifications, additional ballast stone shall be cast in and around all the clumps of the terminal in sufficient amount to bring the elevation of ballast thus placed to within 4 feet of mean low water elevation immediately adjoining the terminal piles. It is estimated that the maximum amount of ballast required to reinforce a 36 pile terminal in accordance with the above instructions will be about 50 cubic yards, but in no case shall more than 100 cubic yards be used.

[fol. 86] No dike line ballast will be placed on either the two row or single pile dikes unless ordered by the Contracting Officer.

Herewith are three maps (scale 1″-2000′).″

Defendant's Exhibit No. 12 is a construction map which has attached to Exhibit No. 11 and received by the Con-

struction Company at the same time Exhibit No. 11 was received. Exhibit No. 12 offered.

"Mr. Van Pelt: To which we renew the objection, and each and every part thereof, made to Exhibit 11; and the added objection that there is no proper and sufficient foundation laid for the admission in evidence of the map, nothing to show its correctness.

The Court: That may be so; but if it is the defendant's theory that under their contract they agreed to, and the War Department required them to do work according to a certain map, may not the map be admissible to show why they did what they did and give them the right to submit it later by showing that what they did under this order and map did relate to Mr. Yearsley's property.

Mr. Rogers: That is exactly our position.

Mr. Van Pelt: This comes then very directly to the question of whether or not it is any defense. If they say that they did any of these things because of some map or because of some written order that they have, signed by Theodore Wyman or any other person, the bailiff of this court, or anybody else, who is paid by the United States government, it comes directly to the question of whether or not they have a right to take our property without due process of law.

The Court: As I am reserving the question under the Fifth Amendment theory that they want to raise, I think there is no harm done by finding out what was done and the authority under which they claim to have done it; and if and when that is shown and we can see that there was no defense it would have to be so decided after they were through with it by taking this entirely away from the jury or telling them to decide questions without this.

Mr. Van Pelt: Now, in order that we may proceed in an orderly manner here without undue delay, does Your Honor want to express any views on whether any motions [fol. 87] to strike should be made at this time to these Exhibits; or is it permissible to leave the motions out, then

make the motions to strike later? I do want to make a motion to strike to these Exhibits.

The Court: If you wish you can reserve your motion and make it at a later time to the same effect as if made seriatim. I will overrule the objection, but I will receive the map only to prove what you were ordered to do and where.

Exception allowed to Plaintiff.

Mr. Rogers: Yes, Your Honor.

The Court: So far as the orders were concerned, and to show that what you did was where the map ordered you to do it. You are taking, I suppose, the defense you were ordered to do work at a certain place, and you did do it there?

Mr. Rogers: Yes, Your Honor.

The Court: And that place adjoined Yearsley's land?

Mr. Rogers: Yes, Your Honor.

The Court: Now, I am admitting this to prove you were ordered to do it at a certain place, whether you did it at that place and whether that place was at Yearsley's land is a matter—

Mr. Rogers: Well, we intend, of course, to go along with our evidence.

The Court: But this is what the War Department told you to do and where to do it?

Mr. Rogers: Yes, Your Honor.

The Court: If you can show that you did this, and that it was where it affects Yearsley's land, why then it will be to get what you claim for your line of defense here.

Mr. Rogers: That is what we are endeavoring to do.

Exception allowed to Plaintiff.

Mr. Van Pelt: As I understand it then as to the genuineness and correctness of the survey of the map it is not being received for that purpose.

[fol. 88] The Court: No.

Mr. Van Pelt: All right."

The original of defendant's Exhibit No. 12 is attached to this Bill of Exceptions, and the following is a photostatic copy thereof:

WAR DEPARTMENT.

COPELAND BEND

Nebraska City

F R E M O N T

I O W A

O T O E

C O U

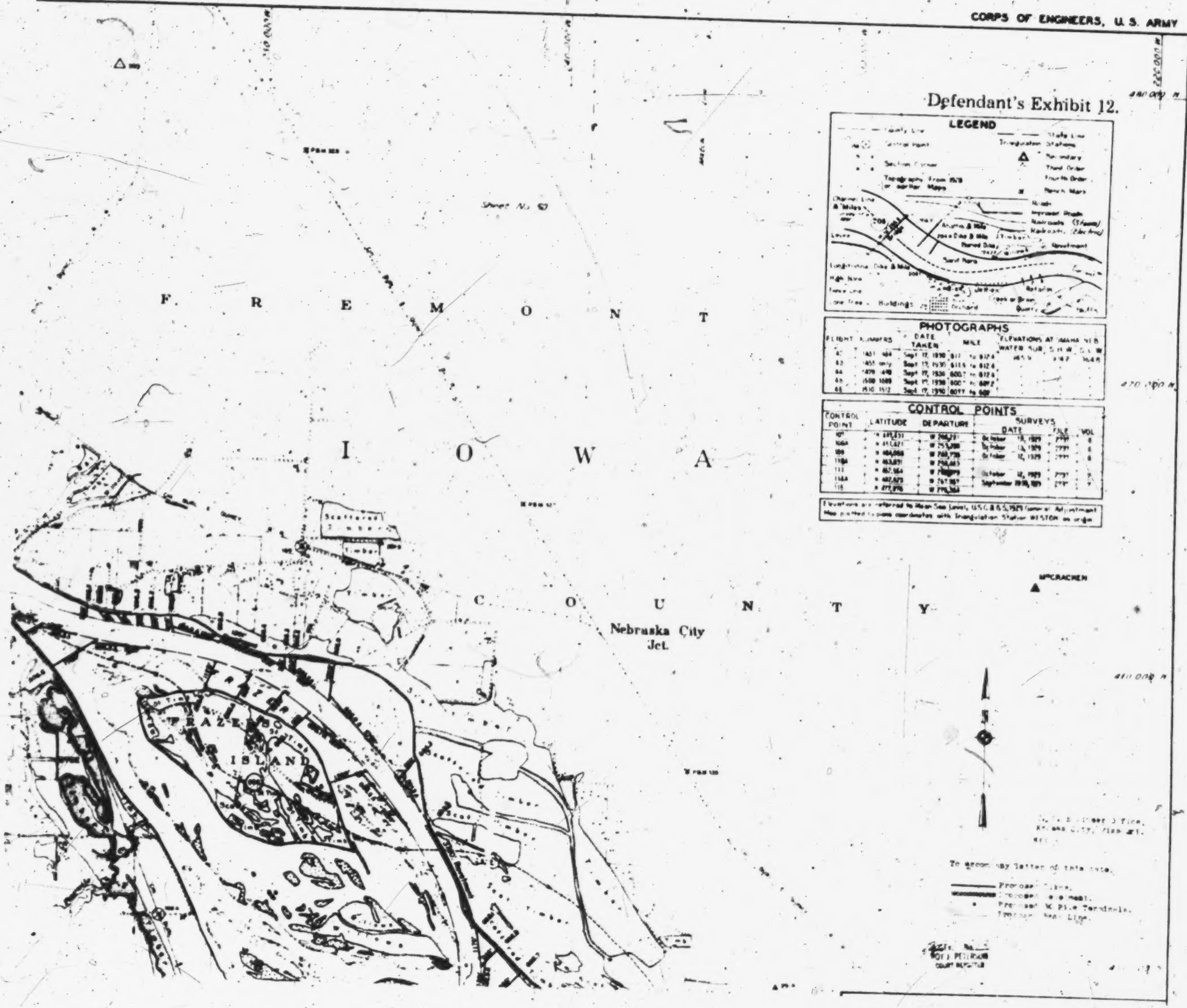
Nebraska City Jct.

N E B R A S K A

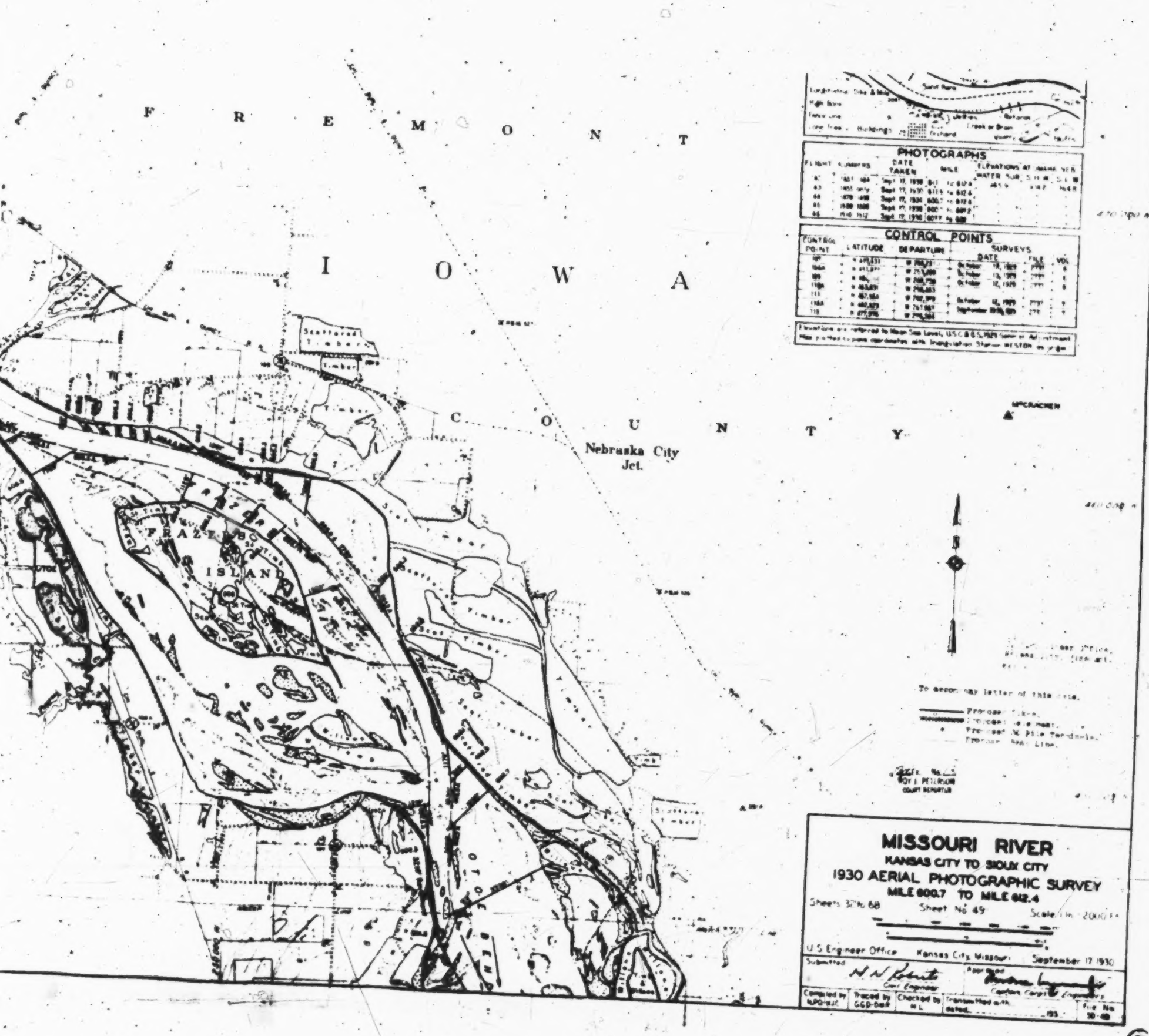
C O U N T Y

CORPS OF ENGINEERS, U. S. ARMY

Defendant's Exhibit 12.



F R E M O N T
I O W A
Nebraska City
O T O E
C O U N
Nebraska City Jct.
NEBRASKA
C O U N T Y
ISLAND


F R E M O N T
I O W A
C O U N T Y
Nebraska City
Jct.
FRAZER
ISLAND
PHOTOGRAPHS
CONTROL POINTS
MISSOURI RIVER
KANSAS CITY TO SIOUX CITY
1930 AERIAL PHOTOGRAPHIC SURVEY
MILE 600.7 TO MILE 612.4
Sheet No 49
U S Engineer Office Kansas City, Missouri September 17 1930

[fol. 90] Direct Examination (Continued).

Exhibit No. 12 identifies the various locations of work to be done as set out in Exhibit No. 11. In the course of this river work I have been up and down the Missouri River many times and am familiar with the location of the Yearsley property. The general location of the Yearsley land on Exhibit No. 12 is at the lower end of the map on the West bank of the river. As you proceed down stream from the top of the Exhibit the right bank is the West bank of the river and the left bank is the East bank of the river. On Exhibit No. 12 dikes are indicated by straight lines and revetments are indicated by cross-hatched lines. The number 601.9 on the East bank of the river at the lower portion of Exhibit No. 12 is the designated number of the dike shown at that point and is derived from the 1890 mileage on the Missouri River from the mouth thereof. On the East bank at the lower end of Exhibit No. 12 dikes Nos. 601.9 and 602.7, and trail dike No. 602.7A have been built, dike No. 602.9 and trail dike No. 602.9A and dike No. 603.1 have been built; revetment No. 603.9 has been built. Trail dikes 604.6A and 602.6A have not been built; dike 602.6 was constructed; standard revetment 602.3 was not built and dike 601.5 was not built.

I have been engaged in this kind of construction work for a period of eight years. I graduated from the School of Engineering at the University of Missouri and since that time have had practical experience in the field for the past eight years. Revetment 603.9 consisted of a graded bank line on which was stone, placed by hand, paved; extending out from up the graded slope a mat was carried out into the river 86 feet; this was a lumber mattress which was packed out and swung to the bottom of the river, so that when this piece was completed it consisted of a board mattress constructed of 1"x 4" lumber, extending from the bottom of the river approximately 86 feet out from the bank into the stream from the toe of the bank and up onto the bank about 9 feet; then the paving was placed over the exposed bank and onto this 9 feet of mattress which went up the slope; the mattress has been swung to the bottom of the river by stone, and along the shore edge of the graded slope there are a series of anchored piles

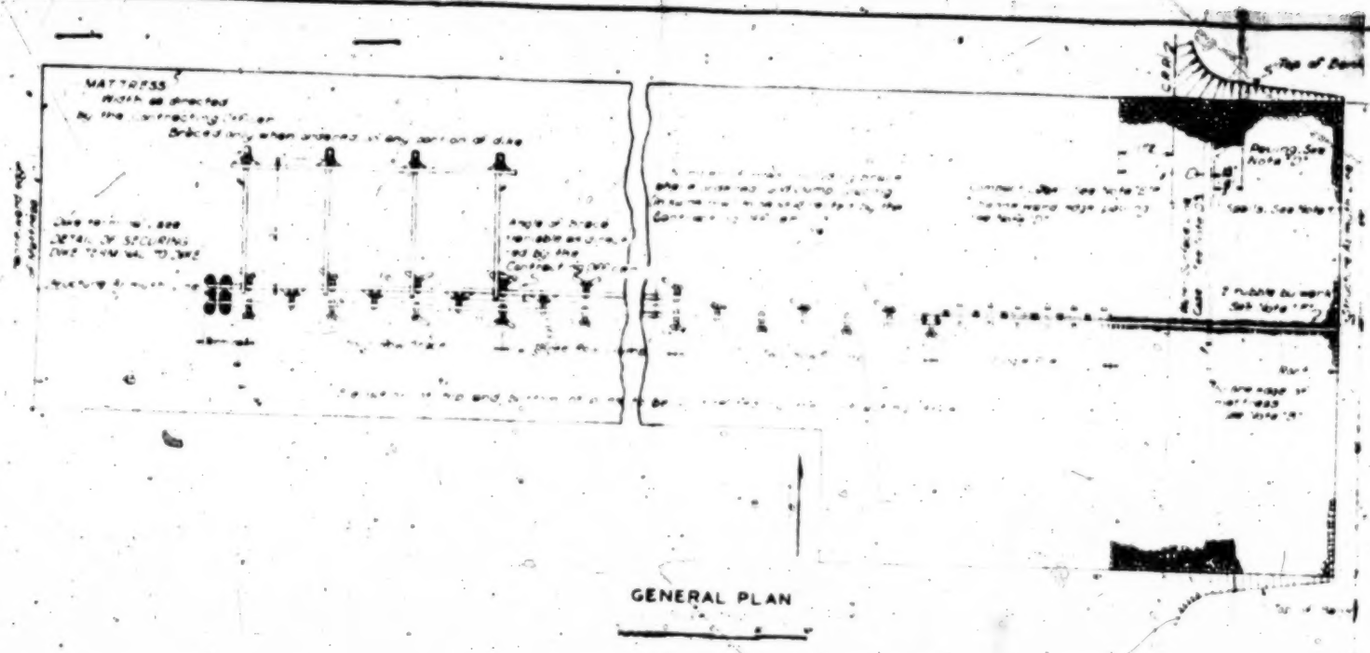
driven approximately 20 feet apart, upon which this mat-
[fol. 91] tress has been anchored. This revetment acts as a buffer and the current strikes the paved area of the revetment and is deflected. It prevents erosion and cutting away of land.

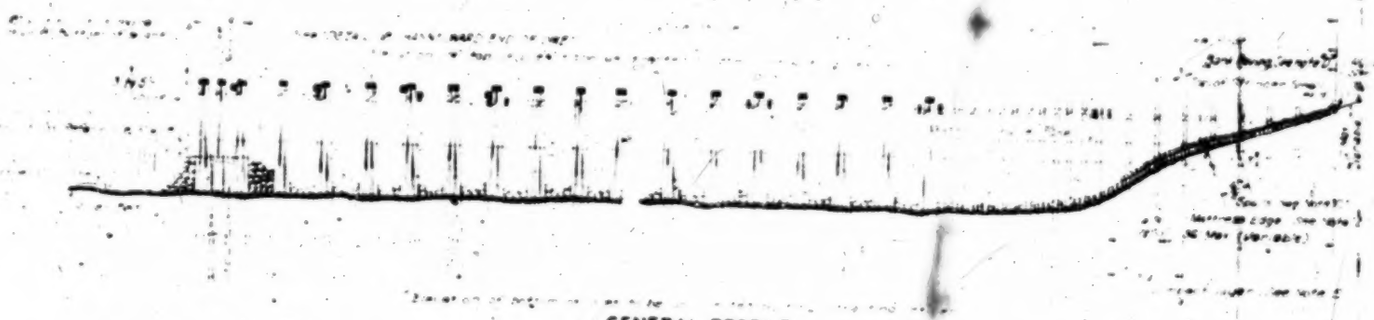
The general construction of a dike begins with a bank head or paved slope similar to a revetment back on the river bank. Then a lumber mattress is woven out of 1 x 4" lumber for the entire length of the dike piling and this mattress is sunk to the bottom of the river with rock and then piling is driven in clusters or clumps of three through this foundation mattress. The piling are driven in rows of two or three and the dike is composed of a series of clumps which are spaced a definite distance apart, each clump being cabled together with 3/8" cable, and each row of piling is fastened together with a stringer piling.

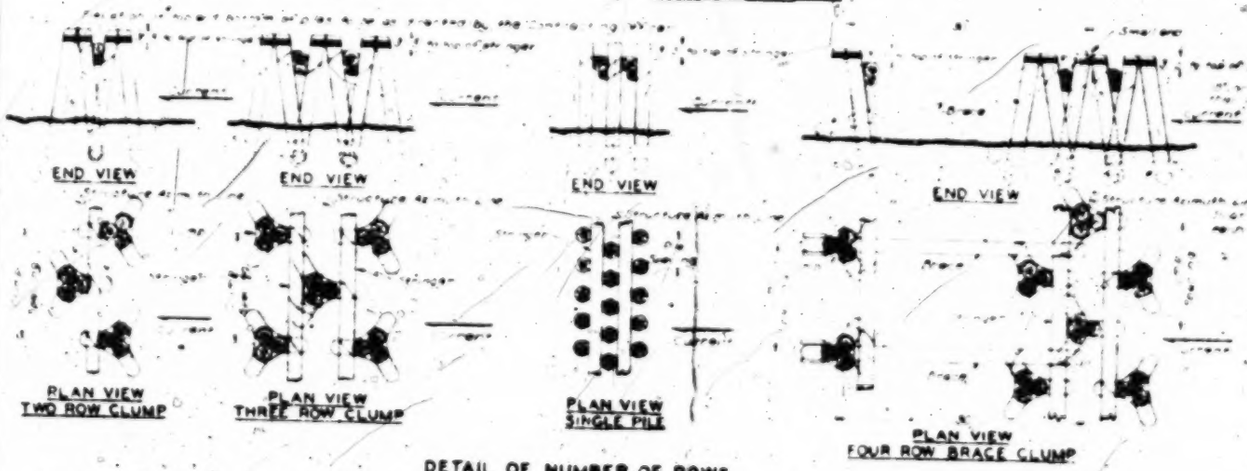
Defendant's Exhibit No. 13 constitutes a part of the specifications and shows a profile of a standard pile dike with lumber mattress and other views or illustrations of the different types of dike construction. The illustration in the center of Exhibit No. 13 shows the profile which started back on the slope of the river bank at the right end and extended out into the river, showing the foundation mattress laid on the bottom of the river with rock piled on it to sink it and piling driven through the mattress. In the lower left hand part of said Exhibit are illustrations of how the clumps of piling are banded together and how the rows of piling are staggered in different types of construction. The three rows are staggered, A and C row are across from each other and B row is in between them. The clump of three pilings are cabled together with a 3/8" cable and the rows are fastened with stringers, so that the dike when complete is a solid mass, that is, when you say a solid mass, I mean it is all joined together at various parts, so that it is a tight structure connected with the bank.

Defendant's Exhibit No. 13 offered and received in evidence for the purposes of illustration only, illustrating the construction of dikes, the original of said Exhibit being attached to this Bill of Exceptions, and the following is a photostatic copy thereof:

WAR DEPARTMENT







DETAIL OF NUMBER OF ROWS

NOTES

NOTE 'A'

BANK GRADING

NOTE 'B'

MATTRESS

NOTE 'C'

SPALLS

NOTE 'D'

BANK PAVING

NOTE 'E'

COMPACT LAYER

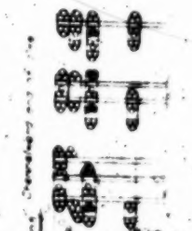
NOTE 'F'

DIKE ROOT

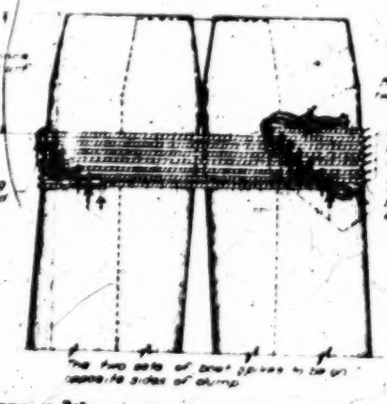
NOTE 'G'

DIKE LINE BALLAST

18 PILE



36 PILE
TO B
ONLY UNDE



APPROVED STRAND TIE SECURING CLUMP PILES

DETAIL OF CLUMPS AND STRINGERS

Defendant's Exhibit 13.

NOTES

NOTE 'A'

BANK GRADING

NOTE 'B'

MATTRESS

NOTE 'C'

SPALLS

NOTE 'D'

BANK PAVING

NOTE 'E'

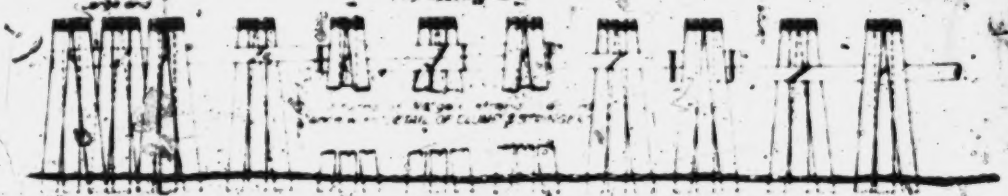
COMPACT LAYER

NOTE 'F'

DIKE ROOT

NOTE 'G'

DIKE LINE BALLAST

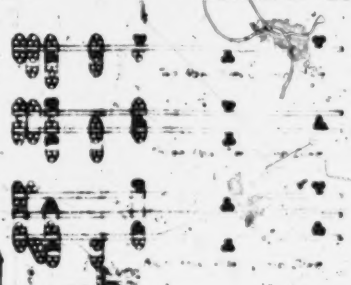


DETAIL OF CHANNELWARD END OF DIKE

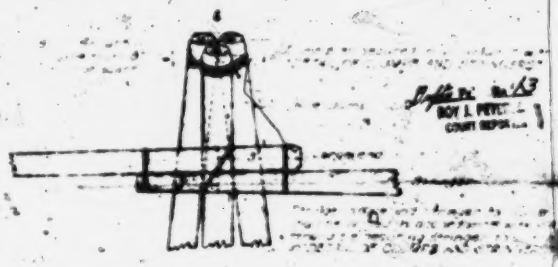
18 PILE DIKE TERMINAL

9 PILE DIKE TERMINAL

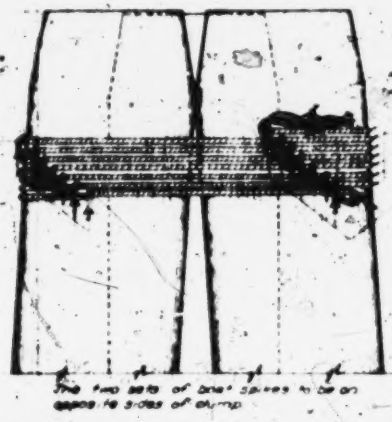
DETAIL OF SECURING DIKE TERMINAL TO DIKE



DETAIL OF
36 PILE DIKE TERMINAL
TO BE CONSTRUCTED
ONLY UNDER SPECIAL AUTHORITY



DETAIL OF STRINGER SPLICE



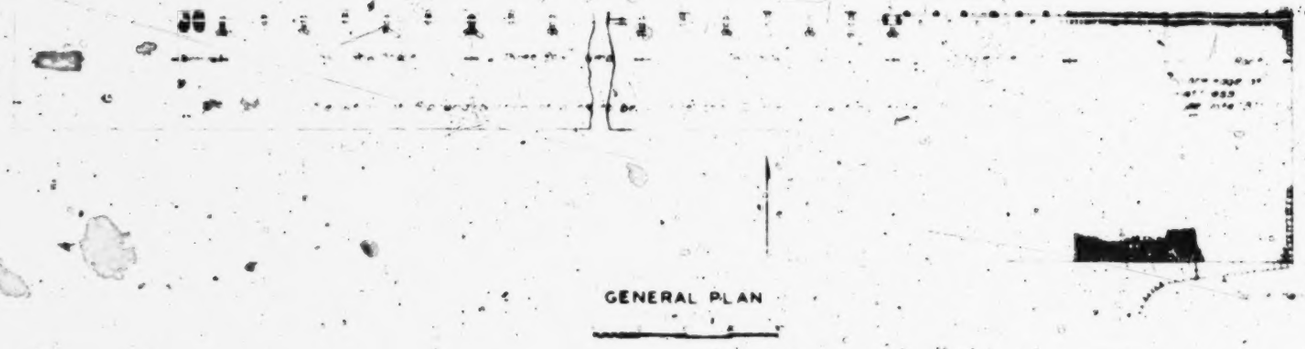
APPROVED 3 STRAND TIE SECURING CLUMP PILES

APPROVED 3 STRAND TIE SECURING STRINGER TO CLUMP

DETAIL OF CLUMPS AND STRINGERS

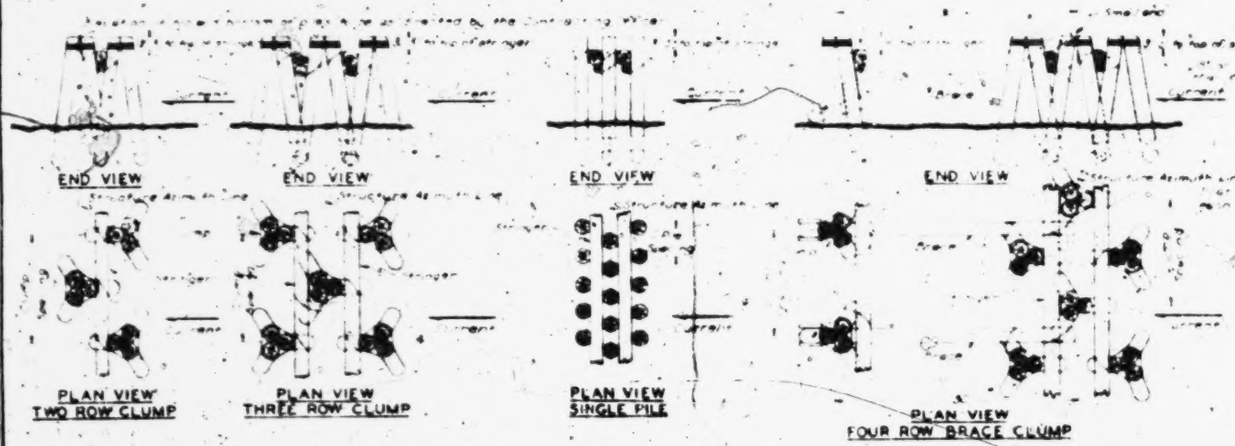
BILL OF MATERIAL

	56		
	56		
	43		
	66		
	56		
	13		
	62		
	100		
220	2200	220	
220	2200	220	
	96		
	25		
20	140	4	
20	160	40	
2			
28			
28			
4			
4			(See Note 'G')

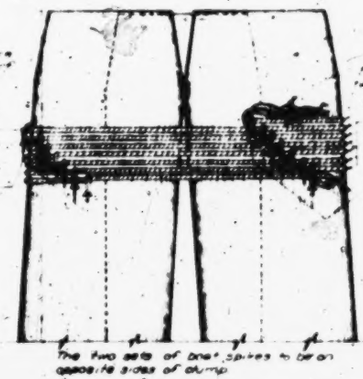


GENERAL PLAN

GENERAL PROFILE

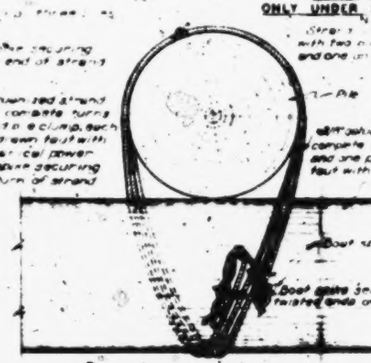


DETAIL OF NUMBER OF ROWS



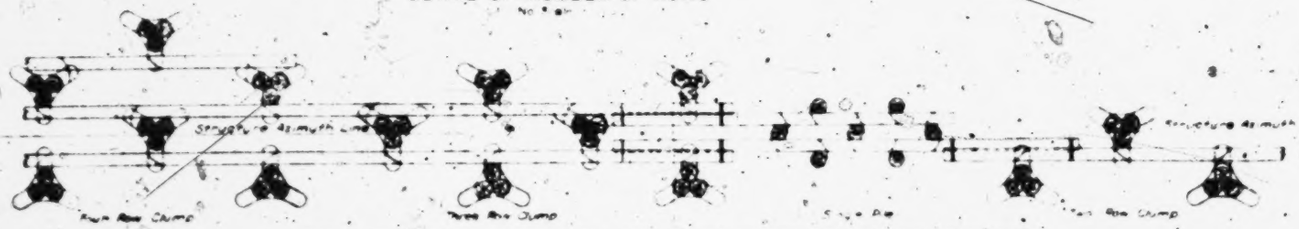
The two sets of boat spikes to be on opposite sides of clump

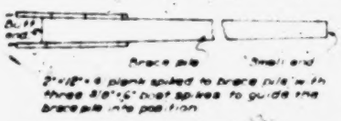
APPROVED 3/4" STRAND TIE SECURING CLUMP PILES



APPROVED 3/4" STRAND TIE SECURING STRINGE

DETAIL OF CLUMPS AND STRINGERS

No. Scale

DETAIL OF TRANSITION FROM ONE TYPE OF STRUCTURE TO ANOTHER



Brace pile Small end

2"x8" x 8 plank spiked to brace pile with three 8"-6" boat spikes to guide the brace pile into position

DETAIL OF BRACE

No Scale

NOTE D

NOTE E

NOTE F

NOTE G

18 PILE DIK

DET

36 PILE D

TO BE

ONLY UNDER

Revised, July 16, 19

NOTE D

NOTE E

NOTE F

NOTE G

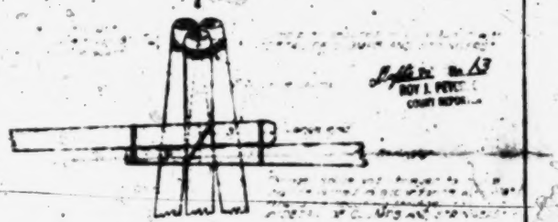
DETAIL OF CHANNELWARD END OF DIKE

18 PILE DIKE-TERMINAL

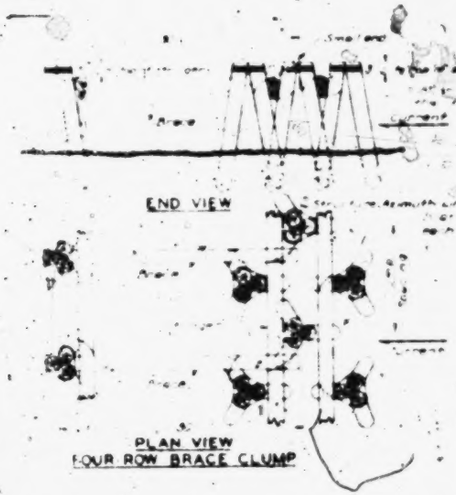
9 PILE DIKE TERMINAL

DETAIL OF SECURING DIKE TERMINAL TO DIKE

DETAIL OF
36 PILE DIKE TERMINAL
TO BE CONSTRUCTED
ONLY UNDER SPECIAL AUTHORITY

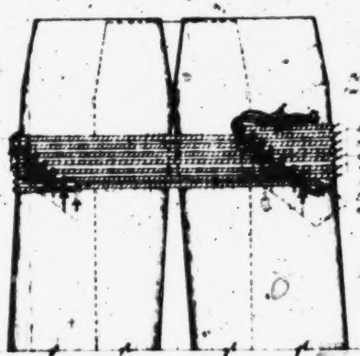


DETAIL OF STRINGER SPLICE

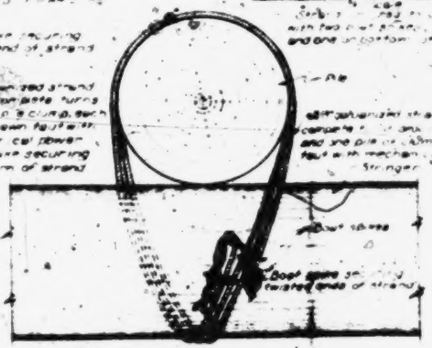


END VIEW

PLAN VIEW
FOUR ROW BRACE CLUMP



APPROVED 3 STRAND TIE, SECURING CLUMP PILES



APPROVED 3 STRAND TIE SECURING STRINGER TO CLUMP

DETAIL OF CLUMPS AND STRINGERS
No Scale

BILL OF MATERIAL

Each	Total	Size	Item
	56		No. pcs. securing stringers (3 row, 6ft. clumps)
	12		No. pcs. securing stringers (3 row, 8ft. clumps)
	43		No. pcs. for securing stringers (4 row, 6ft. clumps)
	66		No. pcs. for securing stringers (4 row, 8ft. clumps)
	56		No. pcs. for securing stringers (3 row, 6ft. clumps)
	12		No. pcs. for securing stringers (3 row, 8ft. clumps)
	43		No. pcs. for 20 ft. stringers, 3 row brace clumps
	62		No. pcs. for 24 ft. stringers, 3 row brace clumps
	226		Lin. ft. 3/8" galv. iron end strand (3 row clumps)
220	2420	6/0	Lin. ft. 3/8" galv. iron center strand (3 row clumps)
220	2420	6/0	Lin. ft. 3/8" galv. iron end strand (3 row brace clumps)
	96		Board ft. of 2" plank (brace clump)
	525		Lin. ft. 1/8" x 6" boat spikes for securing tying strands
20	145	4/0	No. 1/8" x 6" boat spikes (3 row clump)
20	165	4/0	No. 1/8" x 6" boat spikes (3 row brace clump)
10			Cu. yds. spalls for placing mat mattress
128			Cu. yds. one man stone for paving mattress
38			Cu. yds. one man stone for concrete lagging
			Cu. yds. one man stone extra around clumps
4			Cu. yds. one man stone for rubble bulwarks
			(See Note "G")

*Lower bank will require less paving stone for mattress material, see drawing of "STANDARD LUMBER MATTRESS & water piering construction" for estimating purposes.

MISSOURI RIVER IMPROVEMENT
OMAHA DISTRICT

STANDARD PILE DIKE
WITH LUMBER MATTRESS

Sheet No. 1 | Scale As shown

U.S. ENGINEER OFFICE
KANSAS CITY, MO.

MISSOURI RIVER DIVISION
APRIL, 1935

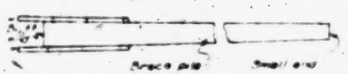
Submitted [signature] | Approved [signature]

Superseding	Dated	Superseded by	Dated
N.A.	N.A.	N.A.	N.A.

Corrected to agree with letter of indorsement dated

Drawing No. 200-3(1)

STRUCTURE TO ANOTHER



Brace pile | Small end

2"x12"x 4 pilots spiked to brace pile with three 5/8"x6" boat spikes to guide the brace pile into position

DETAIL OF BRACE
No Scale

Revised, July 16, 1935

[fol. 93] I have been on the Yearsley land several times and know where it is located. I know where the fence is along the North line of the Yearsley property. The West end of dike 601.9 is directly East of the Yearsley land. The West end of dike 602.7 is North and East of the Yearsley land, being up the river from his land. On Exhibit No. 12 the general location of the Yearsley land is an area on the West bank of the river lying below the South termination or end of dike 602.7A and directly opposite the West end of dike 601.9 and extends down the Exhibit to about the end of the map.

The construction of dike 601.9 shown on Exhibit No. 12 started at Station 2 plus 60 and extended as a 2-row dike to Station 34 plus 90, the spacing of the clumps in each row being 15 feet apart and the piling being driven to a penetration of 20 feet. The top of the clumps were at an elevation of 909.7 feet above sea level and the foundation mattress was 77 feet wide and made of 1 x 4" mattress lumber. From Station 34 plus 90 to the end of the dike it was a 3-row dike with the piling driven to a penetration of 30 feet and the clumps in each row spaced 18 feet apart, elevation and foundation mattress width being the same as on the first section of the dike. There was no screening done on dike 601.9. It is a permeable dike so that the water can flow through it.

I was out on the work during construction several days each week and on such occasions I saw the work in progress on dike 601.9 and examined it each time and after the dike was constructed I made an examination of it for the purpose of determining whether it was constructed in accordance with specifications in the work order Exhibit No. 11.

"Mr. Rogers: And what did you find from your examination?

Mr. Van Pelt: We object to this as no proper and sufficient foundation laid, for the reason it is immaterial under the issues, self-serving; and for the further reason that it does not constitute a defense to the taking of plaintiff's property by the defendant construction company, or the destruction thereof; for the further reason that it does not constitute a justification for the taking of plaintiff's

[fol. 94] property, or justify the taking of plaintiff's property under the right guaranteed by the Constitution of not taking property without due process of law.

The Court: Overruled.

Exception allowed to Plaintiff.

A. I found from my examination that the dike was constructed in accordance with the plans and specifications."

The work order provides the construction of dike 602.7 shown on Exhibit No. 12 was to be started at Station 1 plus 25 and carried to Station 16 plus 10 as a 2-row dike with clumps spaced 15 feet apart and piling driven to a penetration of 20 feet at elevation 910.5 and with a foundation mattress 77 feet wide. From Station 16 plus 10 to Station 18 plus 60 it was a 3-row dike with the clumps spaced 18 feet apart and the piling driven to a penetration of 20 feet with the elevation and foundation mattress width the same. From Station 18 plus 60 to Station 21 plus 10 there was a 3-row dike with the clumps spaced 18 feet apart and the piling driven to a penetration of 30 feet and with elevation and mattress width the same as above stated. I was also on that dike several times each week during its construction and I examined it after it was completed for the purpose of determining whether it had been constructed in conformity with the specifications of the work order No. 11.

"Mr. Rogers: And will you tell the jury whether or not it was so constructed.

Mr. Van Pelt: We object for the reason that no proper and sufficient foundation has been laid, for the reason it is immaterial to the issues of the case, a conclusion of the witness; and for the further reason that answer to the question does not constitute a defense to the taking of plaintiff's property, and would not constitute a taking of plaintiff's property under due process of law.

The Court: Overruled.

Exception allowed to Plaintiff.

A. Yes, that dike was constructed in accordance with the plans and specifications."

The piling in these dikes were measured from a point 3 feet from the butt end and were 13½ to 14 inches in diam-
[fol. 95] eter and sometimes up to 15 inches at the point of measurement.

Dike 602.7A shown on Exhibit No. 12 is a trail dike taking off from dike 602.7 and extends from Station 0 to Station 6 plus 15 as a 2-row dike with the clumps spaced 15 feet apart and the piling driven to a penetration of 20 feet, elevation 910.5 and width of foundation mattress 90 feet. From Station 6 plus 15 to Station 14 plus 65, it is a 3-row dike with the clumps spaced 18 feet apart and the piling driven to a penetration of 30 feet with the same elevation and foundation mattress width as above stated. I was on that dike several times during its construction and examined it after it was completed to determine whether it conformed with the specifications in the work order Exhibit No. 11.

"Mr. Rogers: And did it?

Mr. Van Pelt: We renew the objection previously made to the same question as it concerned the previous dikes inquired about.

The Court: Overruled.

Exception allowed to Plaintiff.

A. It did conform to these plans and specifications."

(This witness testified in the same detailed manner concerning each of the structures that have been completed for a considerable distance on above dike 602.7, including dikes 602.9 and 603.1 and revetment 603.9 on the East bank and dike 602.6 on the West bank, but it is not deemed necessary for the purposes of this appeal to set forth the details of such testimony.)

"Mr. Rogers: Now, Mr. Hamilton, did you have anything whatever to do—or your company, rather, the W. A. Ross Construction Company, have anything to do with originating or getting up those plans and specifications for the erection of those dikes?

Mr. Van Pelt: We object to that as entirely immaterial.

The Court: I think it is immaterial.

Exception allowed to Defendant.

Mr. Rogers: The defendant offers to prove by the witness, Mr. Hamilton, that he in his capacity as vice president and general manager of this company has personal knowledge of the situation, and knows that neither he nor his [fol. 96] company had anything whatever to do with the originating or making of any of these plans and specifications for river improvement work, and that these plans and specifications were originated and gotten up by the War Department of the United States Government and not this defendant.

Mr. Van Pelt: To which the plaintiff objects for the reason that there is no proper and sufficient foundation laid, no proper and sufficient question having been asked to elicit the answer and evidence proposed thereby to be proven in the subject of proof; for the further reason that it is immaterial under the issues in this case.

The Court: Sustained as immaterial.

Exception allowed to Defendant."

The elevation above sea level is measured to the top of the piling after it is driven and is higher as you proceed upstream. At the shore line on the East bank of the river the distance between dikes 601.9 and 602.7 is .8 of a mile. All of the above mentioned dikes which have been constructed were constructed in the directions and occupy the positions shown on the map Exhibit No. 12. Over the objection that it is immaterial under the issue and no proper foundation laid, this witness testified that the points at which we began to work on each dike was located for us by the Chief Inspector of the United States Government on the job.

Over the objection that it was entirely self-serving, calls for a conclusion of the witness and immaterial, this witness testified that trail dike 602.6A shown on Exhibit No. 12 on the West bank was not constructed because the Government inspectors would not let us do it. Dike 602.7 was screened after it was constructed.

Revetment 602.3 and dike 601.5 shown on Exhibit No. 12 on the West Bank have not yet been constructed. After dike 602.7A was completed it was screened at a later date, under a subsequent work order from the Government. Dike 601.9 was not erected as a continuous structure, but the work was stopped on written order from the Government at about 500 feet from its end, but was subsequently extended on out to its original contemplated length under [fol. 97] the later contract Exhibit No. 10. This extension was constructed in 1937, I believe in April or May.

Defendant's Exhibit No. 15 is the letter received in the due course of the mails stopping further construction on dike 601.9. Said exhibit was offered and received in evidence over the following objection:

"Mr. Van Pelt: We object to Exhibit No. 15 for the reason that there is no proper and sufficient foundation laid and for the further reason that it does not constitute a defense to the destruction of plaintiff's property as alleged in plaintiff's petition, or justify their taking his property without due process of law.

The Court: Overruled.

Exception allowed to plaintiff."

(Exhibit No. 15 is a letter dated July 7, 1936 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from Herbert B. Loper, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting formal parts is set forth below):

"Under your Missouri River Improvement Contract No. W461eng.-5368, at Nebraska, Frazers and Otoe Bends, you are ordered to terminate the construction of Dike No. 601.9, left bank, at the beginning of the 3-row portion (approximate station 34 plus 90), or if construction has advanced riverward beyond this station, it will be terminated at the present end of construction. This structure will be terminated at the point designated in accordance with the plans and specifications and will be reinforced by a standard 18 pile terminal driven to a penetration of 30 feet.

The balance of the structure riverward from the terminated point, is hereby rescinded as further advancement is not contemplated under this contract."

Over the same objection made to Defendant's Exhibit No. 15, defendant's Exhibits Nos. 14, 16 and 17 were separately offered and received in evidence and are letters received in the due course of the mails.

(Defendant's Exhibit No. 14 is a letter dated September 12, 1936 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from Herbert B. Loper, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, [fol. 98] and omitting the formal parts and such portions as are immaterial to this case, is set forth below):

"This letter will serve as notice of the formal acceptance of Dike No. 601.9, left bank, as constructed under Contract No. W461eng.-5368, Nebraska, Frazers and Otoe Bends, Missouri River."

(Exhibit No. 16 is a letter dated April 10, 1935 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from J. M. Young, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting formal parts and such portions as are immaterial to this case, is set forth below):

"This will serve as notice of the formal acceptance of dike No. 602.7-A, left bank, as constructed under Contract No. W461eng.-5368, Nebraska, Frazers and Otoe Bends."

(Exhibit No. 17 is a letter dated October 11, 1934 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from J. M. Young, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting formal parts and such portions as are immaterial to this case, is set forth below):

"This will serve as notice of the formal acceptance of dike No. 602.7, left bank, as constructed under the Ne-

braska, Frazers and Otoe Bends Contract, No. W461eng.-5368."

Defendant's Exhibit No. 19 is a letter received from the United States District Engineer authorizing the extension of dike 601.9 on the East bank and authorizing the construction of trail dike 601.9A, which is not shown on Exhibit No. 12. Defendant's Exhibit No. 19 offered and received in evidence.

(Exhibit No. 19 is a letter dated June 3, 1937 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from Herbert B. Loper, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting formal parts, is set forth below):

"Herewith are five copies of a complete construction schedule of all work authorized to date under your ER Contract No. W425eng.-5, Otoe and Hamburg Bends, including the revocation of Dikes Nos. 601.52, 601.4, 601.3 [fol. 99] and 601.3-A, all right bank; extension of Dike No. 601.9, left bank, and authorization for construction of Dike No. 601.9-A, left bank.

This order will not change any work accomplished under previous work orders.

Inclosed are three maps (scale 1"-2000') showing the work covered by the inclosed schedule."

Defendant's Exhibit No. 21 was attached to Exhibit No. 19 and received at the same time and is the work order authorizing the extension of dike 601.9 on the East bank for a distance of 419 feet commencing at Station 35 plus 71 and extending to Station 39 plus 90 as a 3-row dike with clumps spaced 18 feet apart and piling driven to a penetration of 30 feet, elevation 909.7 and width of foundation mattress 77 feet. After the completion of this extension said dike 601.9 conformed exactly to the original work order Exhibit No. 11. Defendant's Exhibit No. 21 offered and received and omitting formal parts and such portions as are immaterial to this case, is as follows:

"• • • • •

Dike Work—Left Bank

No.	Length	Sta. to Sta.	Strength	Elev.	Pene.	Matt.	Term.	Maker Clumps Sta.	Maker Clumps Elev.
602.7A		To be screened as directed by Area Engineer.							
601.9 Ext.	419′	35+71 to 39+90	3-row 18′	909.7	30′	77′	18P.	39+90	919.0
601.9A	1840′	34+90 of Main= to 11+50	0+00 of Trail 2-row 15′	909.7	20′	89′			
		11+50 to 18+40	3-row 18′	909.7	30′	89′		18+40	919.0''

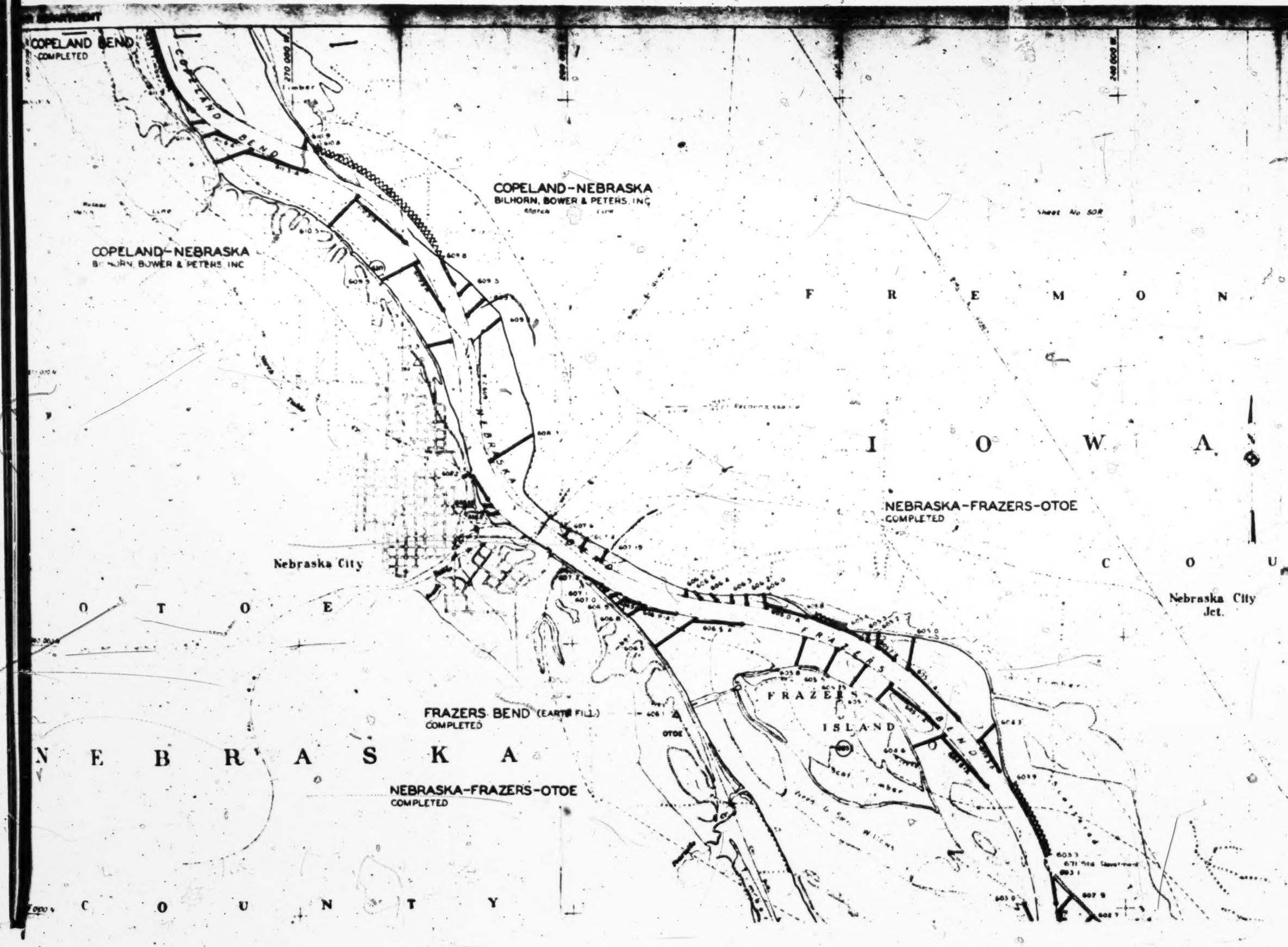
Defendant's Exhibit No. 22 is a letter received in the due course of the mails and over the same objection as was made to Exhibit 14 was offered and received in evidence.

(Defendant's Exhibit No. 22 is a letter dated September 22, 1937 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from Herbert B. Loper, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting the formal parts and such portions as are immaterial to this case, is set forth below):

"This letter will serve as notice of the formal acceptance of Extension to Dike 601.9, left bank (Station 35 plus 71 to Station 39 plus 90) as constructed under ER Contract No. W425eng.-5, Otoe and Hamburg Bends."

[Tail] dike 601.9A authorized under work order Exhibit No. 21 is commenced at Station 0 and extends to Station 11 plus 50 as a 3-row dike with clumps spaced 15 feet apart [fol. 100] and piling driven to a penetration of 20 feet, elevation 909.7 and width of foundation mattress 89 feet. From Station 11 plus 50 to Station 18 plus 40 it was a 3-row dike with clumps spaced 18 feet apart and piling driven to a penetration of 30 feet with the same elevation and width of foundation mattress.

Defendant's Exhibit No. 23 is a construction map which was inclosed with the letter Exhibit No. 19 and received at the same time in the due course of the mails and shows the 419 foot extension on dike 601.9 and also the trail dike 601.9A on the East bank of the river. Defendant's Exhibit No. 23 was offered and received in evidence over the same objection as was made to Exhibit 12 and was received on the same basis as the map Exhibit No. 12 was received, the original of said Exhibit being attached to this Bill of Exceptions and the following is a photostatic copy thereof:


COPELAND BEND
COMPLETED
COPELAND BEND
COPELAND-NEBRASKA
BILHORN, BOWER & PETERS, INC
COPELAND-NEBRASKA
BILHORN, BOWER & PETERS, INC
Sheet No 50R
F R E M O N T
I O W A
NEBRASKA-FRAZERS-OTOE
COMPLETED
Nebraska City
O T O E
Nebraska City
Jct.
FRAZERS BEND (EARTH FILL)
COMPLETED
FRAZERS
ISLAND
N E B R A S K A
NEBRASKA-FRAZERS-OTOE
COMPLETED
C O U N T Y

Defendant's Exhibit 23.

EBRASKA
PETERS, INC

Sheet No 508

F R E M O N T

I O W A

C O U N T Y

LEGEND OF CONSTRUCTION WORK

DIKES COMPLETED
DIKES AUTHORIZED
PROPOSED DIKES

	PILE	STANDARD
REVETMENT COMPLETED		
REVETMENT AUTHORIZED		
PROPOSED REVETMENT		

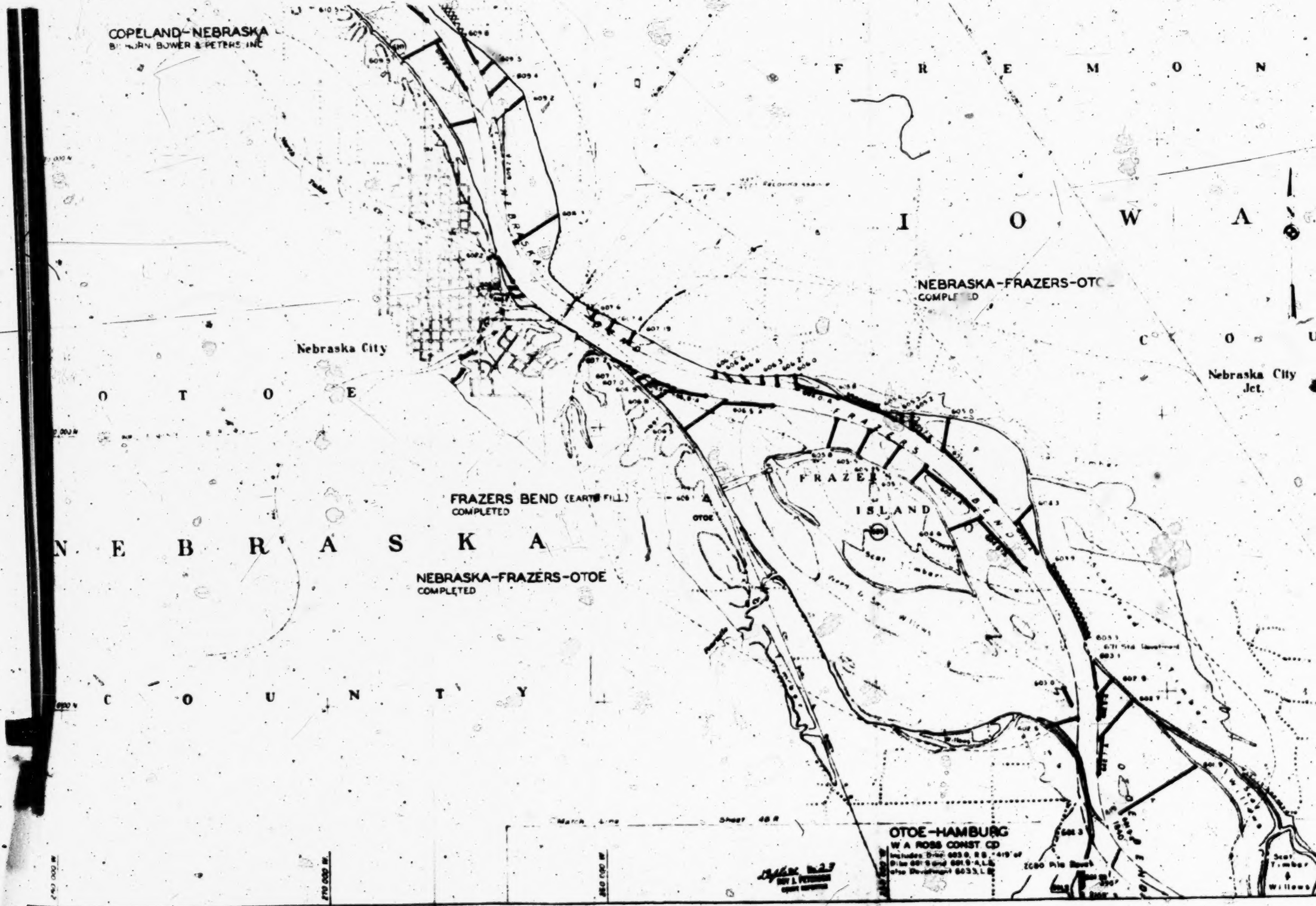
Stage of W.S. above C.R.P. at Gage M 30,
Nebraska City, Nebr. on 1937 34 ft. Apr 2 '07

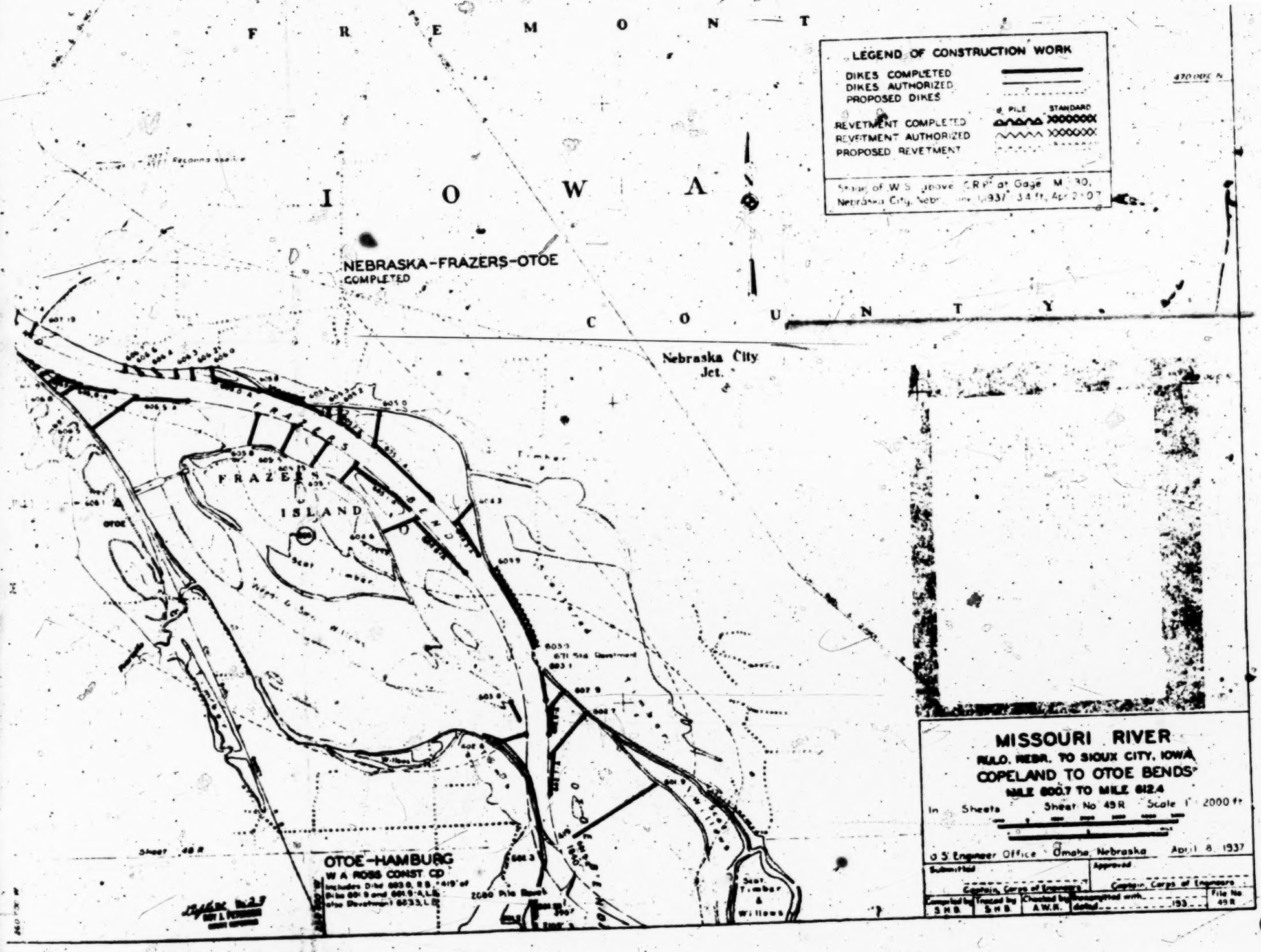
NEBRASKA-FRAZERS-OTOE
COMPLETED

FRAZERS
ISLAND

OTOE

Nebraska City
Jct.


COPELAND-NEBRASKA
BJORN BOWER & PETERS INC
F R E M O N T
I O W A
NEBRASKA-FRAZERS-OTOE
COMPLETED
Nebraska City
O T O E
Nebraska City Jct.
FRAZERS BEND (EARTH FILL)
COMPLETED
FRAZER ISLAND
N E B R A S K A
NEBRASKA-FRAZERS-OTOE
COMPLETED
C O U N T Y
OTOE-HAMBURG
W A ROSS CONST CO


F R E M O N T
I O W A
C O U N T Y
LEGEND OF CONSTRUCTION WORK
DIKES COMPLETED
DIKES AUTHORIZED
PROPOSED DIKES
REVETMENT COMPLETED
REVETMENT AUTHORIZED
PROPOSED REVETMENT
6 PILE
STANDARD
NEBRASKA-FRAZERS-OTOE
COMPLETED
Nebraska City Jct.
FRAZERS
ISLAND
OTOE
OTOE-HAMBURG
W A ROSS CONST CO
Sheet 48 R
Sheet 49 R
MISSOURI RIVER
RULO, NEBR. TO SIOUX CITY, IOWA
COPELAND TO OTOE BENDS
MILE 600.7 TO MILE 612.4
Sheets
Sheet No 49 R
Scale 1" = 2000 ft
U S Engineer Office Omaha, Nebraska April 8, 1937
Submitted
Approved
Captain, Corps of Engineers
Captain, Corps of Engineers
Completed by S H B
Traced by S H B
Checked by A W R
File No 49 R

[fol. 102] After the 419 foot extension was made on dike 601.9 its total length was 3730 feet. The length of the trail dike 601.9A after it is completed will be 1840 feet and is represented on Exhibit No. 23 by the straight line extending down the river and taking off from dike 601.9. Trail dike 601.9A has not yet been completed as it is only completed to within 600 to 700 feet of its final station.

Defendant's Exhibit No. 24 is a letter received by the Ross Construction Company in the due course of the mails and over the same objection as was made to Exhibit 14 was offered and received in evidence.

(Defendant's Exhibit No. 24 is a letter dated April 9, 1937 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from Herbert B. Loper, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting the formal parts, is set forth below):

"This letter will serve as notice of the final acceptance of all work performed under Contract No. W461eng.-5368, dated September 13, 1933, for the construction of Standard Pile and/or Crib Dikes and Revetment in the Missouri River at Nebraska, Frazers and Otoe Bends."

Defendant's Exhibit No. 25 is a letter received by the Ross Construction Company in the due course of the mails concerning further work on dike 602.7A and over the same objection as was made to Exhibit 24 was offered and received in evidence.

(Exhibit No. 25 is a letter dated May 7, 1937 written on the stationery of War Department, United States Engineer Office, Omaha, Nebraska, from Herbert B. Loper, Captain, Corps of Engineers, District Engineer, directed to W. A. Ross Construction Company, and omitting the formal parts, is set forth below):

"Under your ER Contract No. W425eng.-5, Otoe and Hamburg Bends, you are hereby ordered to place a standard lumber screen mattress along the entire length of Dike No. 603.1, left bank, and Dike No. 602.7-A, left bank, as directed by the Area Engineer.

Balance of construction will remain as previously ordered."

A screen mattress is a lumber mattress which is attached to the dike below the stringer and extends down the remaining portion of the dike to aid in securing the fill behind the dike and to facilitate the cutting action of the [fol. 103] water around the end of the dike. As distinguished from a screen mattress, a foundation mattress for dikes is laid upon the bed of the river with rock to prevent scouring out and undermining the piling in the dike. There was a screened mattress on dike 602.7, 602.6 and 602.7A.

There was no washing done on dike 602.7 but we did wash trail dike 602.7A. In August, 1934 we had driven trail dike 602.7A down stream as far as we could go at that time, which was something over 1000 feet. Mr. Cook, Area Engineer, for United States Engineer Department at Nebraska City, instructed me to wash the dike line for the remaining portion of the dike and also told me that we could not drive the dike any farther unless that was done because we had to keep a navigable channel of not less than 150 feet during the construction of this dike. Pursuant to this instruction, I ordered our Diesel boat, "Judge Ross", to commence the washing operation, and from the end of this dike we washed out an area of about 300 feet above the dike and about 300 feet below the dike for a distance of about 200 feet to the West or inland. The southernmost point of the washed area was approximately 800 to 1000 feet North of the North line of the Yearsley property.

There was no washing ever done on dike 601.9.

On Exhibit No. 12 the general location of the area referred to under the contracts as Nebraska Bend is just below the bridge at Nebraska City, the area referred to as Frazers Bend is just opposite Frazers Island, and the area referred to as Otoe Bend is at the southernmost part of the Exhibit.

Cross-Examination.

"Mr. Van Pelt: We first of all move to strike separately, and wish it to be shown as a separate motion, each of the Exhibits 9 to 25, inclusive, for the reasons given in the objections to the Exhibits and each of the same as they were made.

The Court: Overruled.

Exception allowed to Plaintiff.

Mr. Van Pelt: Now, we move to strike each and every answer of the witness to which objection was made, and [fol. 104] make the motion separately during the direct examination of this witness for the reasons given in the objection.

The Court: Overruled.

Exception allowed to Plaintiff."

The lower part of Frazers Island is between two and three miles up stream from the Yearsley land. The washing of the area described in my direct testimony was done on land which I think was owned by Dan Livingston. He has never been paid any damages for such washing. In the washing operation the stern end of the boat was pointed in a southwesterly direction against the West bank of the river and the paddle wheel was rotated to do the washing. Following this washing the remainder of dike 602.7A was constructed.

Revetment 602.3 shown on Exhibit No. 12 on the West bank has not been constructed because under the work order Exhibit No. 11 it could only be constructed under the direction of the Area Engineer, when the West bank had eroded to the located line. Dike 602.7 and dike 602.7A on the East bank assisted in this eroding process. Each of the dikes 602.7, 602.7A and 601.9 helped move the water around their respective ends. There was no screening on dike 601.9. Where numbering appears on dikes or revetments on Exhibit 12 it refers to the length of the dike or revetment. There is some deflection of the current by an unscreened dike, that is one of the purposes of placing unscreened dikes, but a screened dike causes a greater deflection of the current. Screening on dike 602.7 was commenced June 8, 1936 and on dike 602.7A was commenced May 21, 1937. The piling in a dike are driven perpendicular and then after the piling is driven, the tops of the clump of three piling are drawn together and tied with a cable. Before the tops are pulled together the piling are possibly a foot, two foot, and in cases three feet apart. It

s possible to run or step from one cluster to another. My nspections of the dikes as the work progressed was done by walking or stepping along the top of the dike or driving along beside it in a boat.

In building dike 602.7 and dike 602.7A and in building dike 601.9 it was contemplated that the West river bank would be eroded and it was done so that they could even- [fol. 105] tually construct project 602.3. The distances which I gave between dikes is not based upon distances between those dikes in the years when we were working upon them, but was based upon a survey made in the year 1890. The "Judge Ross" was used in the work of the Ross Construction Company on the Missouri River and was in the vicinity of the Nebraska Frazer, Otoe and Hamburg bends the major portion of the time from 1933 to 1937.

Redirect Examination.

During any of the time when I was present on the work I never saw dike 601.9 up against the Yearsley land and I never saw it within 25 or 30 feet of the Yearsley land.

Arthur W. Kendall, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

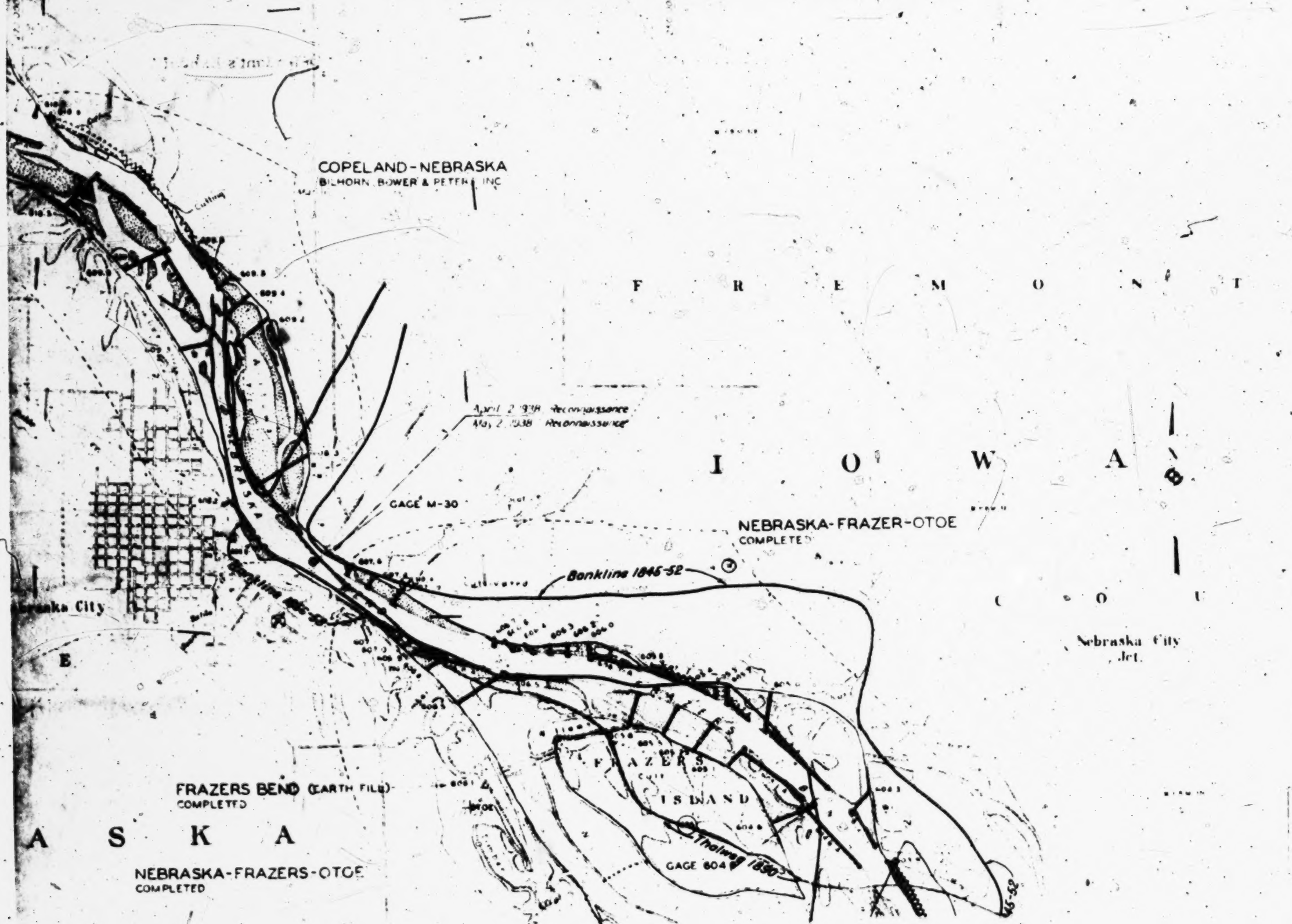
My name is Arthur W. Kendall and I am Chief Draftsman for the United States Engineer office at Omaha, Nebraska. I have held that position for 4½ years and for 5 years prior to that time was Principal Draftsman in the United States Engine r office at Kansas City, Missouri. I am personally acquainted with Lieutenant William Whipple, who has charge of the Engineering Division of the United States Engineer office at Omaha, Nebraska and his division has supervision of all mapping and map records in the district office. I know his signature and his signature appears on the certificate on the face of defendant's Exhibit No. 7. The original tracings from which Exhibit No. 7 was prepared under my supervision is in the Court room for inspection and comparison. Defendant's Exhibit No. 7 offered in evidence.

"Mr. Van Pelt: We think, Your Honor, that there isn't any proper and sufficient foundation for it; that it is an attempt to introduce a map here in the custody of somebody up in Omaha, which in the first place isn't produced, showing surveys that are not in any manner at all shown to be correct.

The Court: Well, I am very doubtful about it; I will overrule the objection.

[fol. 106] Exception allowed to Plaintiff."

Exhibit No. 7 was received in evidence, the original of said Exhibit being attached to this Bill of Exceptions and the following is a photostatic copy thereof:


COPELAND - NEBRASKA
BILHORN, BOWER & PETERS, INC
F R E M O N T
I O W A
GAGE M-30
NEBRASKA-FRAZER-OTOE
COMPLETED
Bankline 1845-52
Nebraska City
Jct.
FRAZERS BEND (EARTH FILL)
COMPLETED
A S K A
NEBRASKA-FRAZERS-OTOE
COMPLETED
FRAZERS
ISLAND
Thalweg 1850
GAGE 804

CORPS OF ENGINEERS U S ARMY

Defendant's Exhibit 7.

COPELAND - NEBRASKA
BIGHORN BOWER & PETERSON INC

F R E M O N T

I O W A

GAGE M-30

NEBRASKA-FRAZER-OTOE
COMPLETED

Bankline 1845-52

FRAZERS
ISLAND

Thalweg 1880

GAGE 604

1845-52

EARTH FILL)

OTOE

Nebraska City
Jct.

C O U N T Y

McCRACKEN

LEGEND OF CONSTRUCTION WORK

DIKES COMPLETED
DIKES AUTHORIZED
PROPOSED DIKES

REVETMENT COMPLETED.
REVETMENT AUTHORIZED
PROPOSED REVETMENT

above ... Gage M 30 Neb
May 2, 938 0-11

THIS MAP IS COMPILED FROM SHEET NO 49 OF THE 1930 AERIAL SURVEY MAP AND IS CORRECTED FROM AERIAL SURVEY OF OCT 26,1937 AND LATEST RECONNAISSANCE SURVEY

A S K A

N T Y

NEBRASKA-FRAZERS-OTOE
COMPLETED

GAGE 604

Thalweg 1890

Bankline 1865-52

Water line of May 2, 1938

OTOE BEND
CONTRACT

OTOE BEND BANK PREPARATION MILE 602.3
HIRED LABOR

OTOE-HAMBURG YEARSLEY
W A ROSS CONST CO

SHEET NO 49 OF
AERIAL SURVEY M
CORRECTED FROM
SURVEY OF OCT 26,
LATEST RECONNAIS

OTOE-HAMBURG
W A ROSS CONST CO

OTOE BEND DRE
HIRED LABOR

GAGE 600.1

I, William Whipple, 1st Lieut. Corps of Engineers, U.S. Army, being custodian of all maps and survey records of the Omaha District Office of the United States Engineer Department, certify that, with the exception of the lines shown in green, this map is a true copy of original tracings on file in this office which have been prepared from survey data which is a part of the official records of this office Dated May 23, 1938 at Omaha, Nebraska

Wm Whipple, 1st Lt. Corps of Engineers

NEBRASKA-FRAZERS-OTOE Thalweg 1890
COMPLETED

OTOE BEND
COMPLETED

Bankline 1865-52

Missouri River

O T O E

OTOE-BARNEY
COMPLETED

OTOE
HIRED

HAMBURG BEND
MASSMAN CONST CO

HAMBURG BEND SAND FILL
HIRED LABOR

Bankline 1865-52

LEGEND OF CONSTRUCTION WORK

	PILE	STAKE AND BRUSH
DIKES COMPLETED		
DIKES AUTHORIZED		
PROPOSED DIKES		
REVETMENT COMPLETED	△△△△△	XXXXXX
REVETMENT AUTHORIZED		
PROPOSED REVETMENT		

Stage of M.S. above C.R.P. ... May ... 1938

HAMBURG-BARNEY
MASSMAN CONST CO
COMPLETED

RS-OTOE

THIS MAP IS COMPILED FROM SHEET NO 49 OF THE 1930 AERIAL SURVEY MAP AND IS CORRECTED FROM AERIAL SURVEY OF OCT 26,1937 AND LATEST RECONNAISSANCE SURVEY

MISSOURI RIVER

RULO, NEBR. TO SIOUX CITY, IOWA

COPELAND TO OTOE BENDS

MILE 600.7 TO MILE 612.4

1937.

gc Rutledge — Corps of Engineers

I, William Whipple, 1st Lieut., Corps of Engineers, U. S. Army, being custodian of all maps and survey records in the Omaha District Office of the United States Engineer Department, certify that, with the exception of the lines shown in green, this map is a true copy of original tracings on file in this office which have been prepared from survey data which is a part of the official records of this office. Dated May 23, 1938 at Omaha, Nebraska.

Wm. Whipple, 1st Lt. Corps of Engineers

OTOE BEND
CONTRACT

OTOE BEND BANK PREPARATION MILE 602.3
HIRED LABOR

OTOE-HAMBURG YEARSLEY
W A ROSS CONST CO

Thalweg 1890

GAGE 604

Bankline 1945-52

Water line of May 2, 1938

NEBRASKA-FRAZER-OTOE
COMPLETED

Thalweg 1890

OTOE BEND
COMPLETED

Bankline 1945-52

Missouri

OTOE

LEGEND OF CONSTRUCTION WORK

	PILE	STANDARD
DIKES COMPLETED		
DIKES AUTHORIZED		
PROPOSED DIKES		
REVETMENT COMPLETED	△△△△	XXXXXX
REVETMENT AUTHORIZED	\\\\	\\\\\\
PROPOSED REVETMENT		

HAMBURG-BARNEY
MASSMAN CONST CO
COMPLETED

OTOE-HAMBURG.
W A ROSS CONST CO

FRE

OTOE BEND DREDGE CUT MILE 600.8
HIRED LABOR

GAGE 600.1

OTOE-BARNEY
COMPLETED

OTOE BEND BANK PREPARATION MILE
HIRED LABOR

HAMBURG BEND
MASSMAN CONST CO

HAMBURG BEND SAND FILLS
HIRED LABOR

ATC

O T O E

COUNTY

NEBRASKA

NEMAHA

COUNTY

LEGEND OF CONSTRUCTION WORK

	PILE	STANDARD
DIKES COMPLETED		
DIKES AUTHORIZED		
PROPOSED DIKES		
REVETMENT COMPLETED	△△△△	XXXXXX
REVETMENT AUTHORIZED		
PROPOSED REVETMENT		

Stage of W.S. above C.R.P. ... ft. ... 19..
Nebraska City Nebr. May 2 1955 0111

HAMBURG-BARNEY
MASSMAN CONST CO
COMPLETED

OTOE-BARNEY
COMPLETED

OTOE BE
HIRED LABO

HAMBURG BEND
MASSMAN CONST CO

HAMBURG BEND SAND FILLS
HIRED LABOR

A

M

Bankline 1855-58

GAGE 595.2

Bankline 1845-52

HAMBURG-NISHNABOTNA
WOODS BROS CONST CO

Thalweg 1855

BARNEY-NISH
WOODS BROS CON

HAMBURG-NISHNABOTNA
WOODS BROS. CONST. CO.

GAGE 592.8

BARNEY-NISHNABOTNA
WOODS BROS CONST CO

Wm Whipple, Jr. U.S. Corps of Engineers

Missouri River

Bankline 1855-58

Bankline 1945-52

O T O E

O T O E

O M I S

N E B R A S K A

K A N S A S

N E M A H A

O U N T Y

O U N T Y

LEGEND OF CONSTRUCTION WORK

DIKES COMPLETED

DIKES AUTHORIZED

PROPOSED DIKES

	PILE	STANDARD
REVETMENT COMPLETED	△△△△△	XXXXXXX
REVETMENT AUTHORIZED	△△△△△	XXXXXXX
PROPOSED REVETMENT	△△△△△	XXXXXXX

Stage of W.S. above [illegible] Datum

Bridge City Datum May 2, 1943 - 0.0 M

HAMBURG-BARNEY
MASSMAN CONST CO
COMPLETED

OTOE-BARNEY
COMPLETED

OTOE BEND BANK PREPARATION MILE
HIRED LABOR

HAMBURG BEND
MASSMAN CONST CO

HAMBURG BEND SAND FILLS
HIRED LABOR

GAGE 595.2

HAMBURG-NISHNABOTNA
WOODS BROS CONST CO

HAMBURG-NISHNABOTNA
WOODS BROS CONST. CO.

BARNEY-NISHNABOTNA
WOODS BROS CONST CO

BARNEY-NISHNABOTNA
WOODS BROS CONST CO

KANSAS
CONTRACT

GAGE 582.8

[fol. 108] The square inclosed by the letters, "A, B, C and D" on Exhibit No. 7 represents Section 31, Township 8, Range 15, in Otoe County, Nebraska. The smaller square inclosed by the letters "A, E, F and G" on Exhibit No. 7 within the larger square above described represents the Yearsley 250 acres of deeded land and said lines were drawn on said Exhibit by me.

Cross-Examination.

"Mr. Van Pelt: We move to strike and to withdraw from the consideration of the jury defendant's Exhibit No. 7, for the reasons given in the objection thereto.

The Court: Overruled.

Exception allowed to Plaintiff.

The Court: I will say that I think the new statute of Congress in 1936 has a bearing on this. That any writing or records, whether in the form of an entry in a book or otherwise, made as a memorandum in regard to any act, transaction, occurrence or event may be allowed in evidence as to said act, transaction or occurrence if it shall appear that it was made in the regular course of any business and it was the regular course of any business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. Circumstances to the making of the record, and so forth, including lack of personal knowledge of the maker may be shown to affect its weight, but shall not affect its admissibility. I think that statute intended to cover not only book accounts or memoranda made of what has happened or what has been done, but a map also would be a memorandum of the transaction. That is influencing me somewhat in the ruling."

I had nothing to do with making any of the surveys on the ground from which Exhibits 7, 26 and 27 were prepared and had nothing to do with the actual taking of the aerial photographs upon which said exhibits were made and I have never been in the vicinity of Section 31, Township 8, Range 15, in Otoe County, Nebraska.

B. E. Dodds, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

[fol. 109] Direct Examination.

My name is B. E. Dodds and I am Junior Engineer with the United States Engineer Department and I am now stationed at Nebraska City, Nebraska. I have been with the Engineering Department of the United States War Department since 1922. I have never been employed by the W. A. Ross Construction Company.

In June, 1937 I was on the Yearsley land in charge of a labor party cutting timber and brush. I personally hired the laborers in the party. Defendant's Exhibit No. 28 is the record kept by me of the work performed by this labor party and said record was made at that time on June 1, 2, 3, 4 and 5, 1937 and is my report to the Area Engineer of the work performed in clearing revetment 602.3 on the right or West bank of the Missouri River. Defendant's Exhibit No. 28 offered and received in evidence.

(This report gives a detailed record of area cleared, number and size of trees cut, man hours of labor performed, and money earned, and a summary of the total of such items for the entire period. For the purposes of this appeal only the summary need be shown and is set forth below):

"Summary of 10 days' work June 1 to 5 Incl.
Location of party: Otoe Bend Revet. 602.3.
Work started at Sta. 0 plus 00 and extends to Sta. 30 plus 92.

Acres cleared			25.04
Trees cut	6" dia.	No.	160
" "	8" "	"	70
" "	10" "	"	30
" "	12" "	"	10
	Total		270
Total man hrs.		338½	
Total money expended $ 174.53.			"

The trees mentioned in Exhibit No. 28 were cut down by this labor party and were cut up into smaller lengths and left on the ground. The labor was paid for by the United States Government. I started clearing at Station 0 of proposed revetment 602.3, which is 1700 feet North of

the North line of the Yearsley land, and continued clearing a distance of 1392 feet South of the North Yearsley line, to Station 30 plus 92. Station 30 plus 92 means 3092 feet from the starting point which was Station 0 at the North end of the proposed revetment 602.3. On the 1392 feet [fol. 110] area extending South of the Yearsley North line the growth which I cleared consisted of willows, brushes and cottonwood timber. There was also some bull rushes and weeds on the area which was not cleared off. The timber which we cut was from 6 to 12 inches in diameter and was all East of the proposed revetment line for revetment 602.3 shown on Exhibit No. 7. This clearing was done pursuant to a work order issued by Captain Loper, District Engineer, United States Engineer office at Omaha. There were no crops of any kind on the Yearsley land in June, 1937 East of the proposed revetment line shown on Exhibit No. 7 and the West bank of the river. The character of the soil on the cleared area was sand and gumbo—mostly sand. The purpose of clearing the trees and cutting them up was to prevent them from forming potential snags in the river and thereby making a menace to navigation. At the time I commenced clearing on 6-1-37 there was no evidence of freshly cut trees in the area South of the North Yearsley line and East of the proposed revetment line shown on Exhibit No. 7 and there has been no cutting of timber or clearing done in that area since that time except what I did from June 1 to 5 inclusive, 1937.

I was inspector of United States Engineer Department on the screening of dike 602.7A and on the construction of the 419 foot extension on dike 601.9 and on the entire construction of trail dike 601.9A as far as it has been completed to date.

After the construction of dike 602.7A a screen mattress made of lumber was placed on the riverward face of the dike, extending about 4 feet from the top of the dike down to the bed of the river for the entire length of the structure. I was there on the job every day during the progress of this work of screening of Dike 602.7A and it was done in accordance with my directions and, over objection of plaintiff that it was immaterial and no proper defense to this action, this witness testified that he approved the manner in which the work was done.

I was on the location during the construction of the 419 foot extension of dike 601.9 and saw it being constructed. It was a 3-row dike with clumps spaced 18 feet apart and the piling driven to a penetration of 30 feet below the foun-
[fol. 111] dation mattress, which was laid on the bed of the river. Over objection of plaintiff that it was immaterial and constituted no proper defense to this action, the witness testified that this extension was constructed in accordance with his directions and he approved the manner in which it was constructed.

The construction of trail dike 601.9A has progressed about 1600 feet and I have been on the location of that dike during its construction and, over objection of plaintiff that it was immaterial and constituted no proper defense to this action, the witness testified that it had been constructed in accordance with his directions and he had approved the manner in which it had been constructed so far as the work had progressed to date, said dike not yet being completed.

During the construction of the 419 foot extension on dike 601.9 there was no washing done with paddle boats at the end of that dike, nor has there been any washing done at the end of trail dike 601.9A during its construction.

Cross-Examination.

I am not a commissioned or non-commissioned officer in the United States Army, am not an United States Army engineer, have had very little engineering school training and am not a graduate engineer. I have been a Junior Engineer five years, which requires no engineering training except such practical experience as one may have.

All of the men in my labor party which was doing the clearing had previously worked for Ross Construction Company. At the time the clearing was done the Ross Construction Company was shut down and was not operating. The cleared area was about 200 to 210 feet wide at the Yearsley North line. At the South end of the clearing at Station 30 plus 92 the area was about 959 feet wide. The North line of the Yearsley land would be Station 17 plus 0 or 1700 feet South of the North end of the proposed revetment 602.3. Part of the area that was cleared by my

labor party in June, 1937 is now in the river, the average width of such area now in the river would be about 150 feet. Any tree cutting done in July, 1937 was not done by me.

[fol..112] Redirect Examination.

I had an office on the quarter boat which was located at about the North end of the proposed revetment 602.3 and I worked out of that office during the construction of the extension to dike 601.9 and the construction of dike 601.9A in the vicinity of the Yearsley land from June until the middle of October, 1937. In going to and from my work and while I was out on the job inspecting the construction of dike 601.9A and the extension of dike 601.9, I could see the Yearsley land and I did not see anybody cutting trees on the portion of the Yearsley land lying East of the proposed revetment line from June 5, 1937 to the middle of October, 1937.

HERBERT B. LOPER, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Herbert B. Loper, and I am Captain of a Corps of Engineers in the United States Army. I graduated from West Point Military Academy in 1918 and from Massachusetts Institute of Technology in 1921 and from the Engineers School of the United States Army in 1929. I was detailed by the United States War Department to river work in 1921 for two years and was again detailed to river work in 1934, when I was sent to Omaha, Nebraska on Missouri River work.

From January, 1934 until August 1, 1935 I was assistant to the District Engineer in charge of field operations on the Missouri River work, and on August 1, 1935 I was made District Engineer at Omaha, Nebraska and remained in that position until February 9, 1938 when I was transferred from the Omaha district. The work done by the Ross Construction Company under its contracts with the United States Government was within the Omaha district and under my immediate supervision.

In January, 1934 the work was in progress at the upper end of Frazers Island, but no work had been done below Frazers Island or in the vicinity of the Yearsley land. On January 19, 1934 work was in progress on revetment No. 605.8. The upper end of revetment 603.9 had been put in; no work had been done on 603.3 or 601.9 or 602.6.

[fol. 113] From the beginning of 1934 and continuing until I was transferred from the Omaha district, I made inspection trips up and down the river on the average of once per week during the open water season, which was from early March until sometime in December of each of the years 1934, 1935, 1936 and 1937. On such inspection trips I inspected the work under construction for conformity to details called for by the contracts and specifications, for location and direction, and for effect in doing the work for which the structures have been devised. In addition to my personal inspections the Government inspectors on the job made reports as the work progressed and these reports were examined by me. On Exhibit No. 7 completed dikes are designated by full heavy lines and completed revetments by full heavy cross-hatched lines.

In March, 1934 the river split just below the Nebraska City bridge into two channels, one on either side of Frazers Island. Each channel carried about an equal amount of water. At the southernmost extremity of Frazers' Island the two channels rejoined and flowed in a southeasterly direction approximately 1000 feet from the Iowa shore—that was where the best water was located, although there was no well defined channel in the vicinity below the island.

Before defendant's Exhibit No. 24, the letter of final acceptance of work done under contract Exhibit No. 9 was sent, I made an inspection of the work done under the contract by personal observation, which was supplemented by reports from my subordinates in immediate charge of construction operations. These subordinates were the Area Engineer in Direct Charge, Assistant Area Engineer, Chief Inspector, and a Corps of Inspectors under the Chief Inspector, one inspector for each shift on which any paywork was being done. The chief inspector during the major portion of this work was Junior Engineer Maxwell

and during a small portion of this work was Junior Engineer Dodds. I have been on the Yearsley land and am familiar with its location and with the location of the North boundary line of the Yearsley property, and of the proposed revetment line along the Yearsley land. The proposed revetment line begins at a point marked 602.3 on Exhibit No. 7 and proceeds in a curved course to the southeast for a distance of a little over 3000 feet.

[fol. 114] I was along the river in front of the Yearsley land on May 17, 1938 and the course of the river at that place is a southeasterly direction. The main current of the river is about 200 feet East of where the proposed revetment line crosses the Yearsley North line and the distance from the river increases as you follow the revetment line down stream.

In March, 1934 immediately following the ice run the land lying East of the Yearsley deeded land was overflowed by about 2 feet of water; it did not again overflow until March, 1935 when the water rose about the same elevation with reference to the Yearsley land. In June, 1935 the water was considerably higher than it was in March, 1935 and it covered the land East of the intermediate or secondary bank, which is a definite indentation in the earth's surface where the river had once had a full bank, lying between the present high bank and low bank of the river. This secondary bank follows very closely along the proposed revetment line across the Yearsley land. The same land lying East of the secondary bank was again overflowed in July, 1935, but there was no further flooding after that until June, 1937.

On the Missouri River we have a "June rise" every year which is caused by snow melting in the mountain areas to which the Missouri River is tributary and we generally have a "March rise".

Dike 603.1, dike 602.9, dike C02.9A, dike 602.7, and approximately 1000 feet of dike 602.7A and approximately 600 feet of dike 602.9, were all constructed between July and December of 1934. Dike 602.7A was completed early in March, 1935. Dike 601.9 was extended to within 490

feet of its end in the summer of 1935 and early spring of 1936.

I ordered the screen constructed on dike 602.7 and on trail dike 602.7A. There was no screen constructed on dike 601.9. I ordered the washing to be done on the bank opposite or immediately adjacent to the end of trail dike 602.7A in order that the dike might be continued and completed.

I ordered the Area Engineer at Auburn, Nebraska to cut timber and brush on the Yearsley land between the proposed revetment line and the river bank. The purpose of cutting the timber was to prevent the cost of removing [fol. 115] snags from the river at some future date, which snags would become a menace to navigation. Over objection of plaintiff that it was immaterial and in no way constituted a defense to this action the witness testified that the Ross Construction Company had nothing to do with the order that he gave to cut the timber.

I was on the Yearsley land approximately the middle of 1935 and walked from one end of the proposed revetment line to the other end for the purpose of determining bank elevation. I can't tell you anything much about that land because I wasn't there for the purpose of examining the crops or soil. I can only say, I saw no crops.

The distance between the end of dike 601.9 and the proposed revetment on the opposite bank is the stabilized low water channel and will be 700 feet wide. Of course, the actual width of the channel depends upon the elevation of the water. The proposed revetment 602.3 shown on Exhibit 7 on the right bank has not been constructed and can not be constructed until the river bank erodes to the proposed line.

The improvement work provides for a channel of 6 foot navigable depth from Sioux City to Quindaro Bend and a width of 300 feet slightly increased at the bends. I personally designed the proposed channel from approximately ten miles south of Sioux City to the vicinity of Blair, Ne-

braska, and made revisions of the design in the channel line of the river within the Omaha district. Over objection of plaintiff that it is immaterial, no proper and sufficient foundation laid, and it in no way constitutes a defense to plaintiff's cause of action or justifies the taking of plaintiff's property, the witness testified that the improvement work covered by the contracts, Exhibits 9 and 10, fits in as a part of the work above and below the area on the river covered by said contracts.

"Mr. Rogers: Now, Captain Loper, do you know whether or not this work that has been provided for in these two contracts, Exhibits 9 and 10, and shown and set out here on this Exhibit Number 7, is a part of the general improvement work undertaken by the United States Government to improve the Missouri river for purposes of navigation from Sioux City to Quindaro Bend?

[fol. 116] Mr. Van Pelt: We object to this as immaterial, in no way constituting a defense to this action, no way justifying the taking of plaintiff's property without due process of law, and no foundation for it.

The Court: I don't think there is any foundation for it.

Exception allowed to Defendant.

Mr. Rogers: I offer to prove by this witness that in his official capacity and his work which he did here in connection with the supervision of the work described in his testimony, he knows that the work provided for in the contracts, Exhibits 9 and 10, was a part of the general plan of improving the Missouri river for the purposes of navigation, and between Sioux City and Quindaro Bend.

The Court: You may show by him anything he actually knows about the work, about this.

Mr. Van Pelt: We object to the offer for the reason it is immaterial, no proper and sufficient foundation laid, and not the best evidence.

Exception allowed to Defendant."

Cross-Examination.

When testifying that I saw no crops when I was on the Yearsley land in 1935, I was not intending to say that there were no crops there. I do not actually know who cut timber on the Yearsley land in 1937. In March, 1934 one-half of the channel of the river was going on the North side of Frazers Island and one-half on the South side of Frazers Island; by channel I mean percentage of flow.

The construction of proposed revetment 602.3 contemplates the erosion of a part of the Yearsley property. In March, 1934 the main channel of the river was approximately 2000 feet from the Yearsley deeded land. There was at that time and still is one well defined channel which flows across what is referred to as the Yearsley accreted land. This channel takes off from the main channel of the river.

This secondary channel has not changed much in location since March, 1934 at the point where it crosses the Yearsley South line.. The main channel of the river has [fol. 117] moved toward the West approximately 1500 feet since that time. This movement has been due in part, if not entirely, to the construction of dikes and revetments to the North of the Yearsley land.

Redirect Examination.

The present location of this secondary channel or chute commences at a point on Exhibit 7 about 300 feet West of the proposed end of dike 601.9A and runs almost due South. I was down on the river in this vicinity on May 17, 1938. I have compared a map just like Exhibit 7 with the ground in that vicinity and have found from such comparison that all features which I have examined on the ground are correctly located on Exhibit 7 including the dikes and revetments shown thereon and the proposed location of revetment 602.3 on the Yearsley land.

CHARLES C. COOK, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Charles C. Cook and I live at Omaha, Nebraska. I am a Civil Engineer with the United States War Department, Engineer Department. I have been with the Engineer Department for 20 years and have been working out of the Omaha district in connection with Missouri River improvement work since September or October, 1932. Prior to then I had been working out of the Kansas City district on Missouri River work, which at that time also included the Omaha district. I have been working on the Missouri River work for the past ten years, doing everything from inspecting to supervising the work in a designated area. At the present time I have supervisory duties over the construction work on the river from Sioux City to Rulo, Nebraska, Rulo being below the work which the Ross Construction Company is doing.

Beginning in the fall of 1933 as Area Engineer, I had supervision over the Ross Construction Company job on the Missouri River. It was my duty to see that the work was performed in accordance with the contracts and specifications as designated by the War Department. I was on that job until May, 1936. At the time I left the job [fol. 118] dike 602.7 and trail dike 602.7A were completed. My designated Chief Inspector personally supervised the construction of screen mat on trail dike 602.7A as to details at the time it was being constructed and I inspected it after it was completed to see that the screen was tied to the dike at the proper distance above the water line. This screen mat was constructed under the orders of Captain Loper, District Engineer at Omaha, Nebraska. I was down on the job during construction of dike 602.7A and the screen mattress thereon from 2 to 5 times a week, and it was constructed in accordance with the plans and specifications and such order from the District Engineer.

During the construction of trail dike 602.7A I instructed the contractor after receiving instructions from the Dis-

trict Engineer, to take his boat and wash out the bank of the river at the end of the dike so that it could be completed, as we required the contractor to maintain a 150 foot space between the end of the dike and the river bank for the purpose of navigation and when the contractor built up to a point which fell within that 150 feet, he could not proceed any further without the bank eroding, and in order to hurry the work along we had the contractor wash that bank out so he could construct some more on this trail dike. I am familiar with the location of the Yearsley deeded land and this washing took place North of his land. The bank that was being washed was about 4½ feet above the water and was nothing more than a low bar, which extends out in front of this entire area in the vicinity of the Yearsley property. So far as I know there was never any washing ordered to be done in front of the Yearsley land. I went past the Yearsley land a couple of times each week in a boat and I have been out on the land immediately East of the Yearsley deeded land several times. I am familiar with the location of the proposed revetment line along the Yearsley premises and between this proposed revetment line and the river bank the soil is a typical low Missouri River bar, consisting mostly of sand, with spots of gumbo here and there. The vegetation on this area was principally willows and brush. This low bar is about 4½ feet above the low water elevation or the low water stage of the river and was laid in there by the river. This entire [fol. 119] area East of the Yearsley property we call bar, because it has been laid in there by the river, the river having been over that entire land at one time and as it moved out it laid back in this bar.

Over the objection of plaintiff as immaterial and constituting no defense in the action, the witness testified that the Government engineers ran surveys on the ground and located all of the dikes for the contractor. The place where the construction of each dike commenced was marked by us for the contractor. Over the objection of plaintiff that it was immaterial and constituted no defense, the witness testified that some one for the Government was on the job all the time to see that each structure was started in the right place and constructed in strict ac-

cordance with the plans and specifications. I or some of my men stayed there to see that it was constructed to the proper length, that the piles were driven the proper distance apart, and to the proper depth and that the proper height was left out of the water and there was the proper number of clumps in each dike.

About the first 3000 feet of dike 601.9 was constructed during the time I was Area Engineer at Nebraska City and when construction reached that length it was stopped because there was not sufficient channel room to carry construction any further. Our instructions required us to maintain 150 feet between the end of the dike and the opposite bank for the purpose of navigation. During the construction of this 3000 feet of dike 601.9 the end of the dike was never up against the Yearsley land and I never saw it within 25 or 30 feet of the Yearsley bank. I never saw any washing with a paddle boat at the end of dike 601.9 during the construction of the first 3000 feet of said dike. Over objection of plaintiff as calling for a conclusion of the witness, immaterial, constituting no defense to plaintiff's action, and in no way justifying the taking of his property without due process of law or paying compensation therefor, the witness testified that the construction of this 3000 foot portion of dike 601.9 was done in accordance with the plans and specifications laid down by the United States Government. At the present time the Government has a dredge operating at a point South of the [fol. 120] Yearsley property in the neighborhood of dike 600.8 and the Government proposes to dredge a cut starting about opposite dike 600.8-C and dredge on up through the bar land in front of the Yearsley property and connect with the slough, so as to open up a pathway for the water down by the end of those dikes rather than the course it is now taking over farther to the East. The Ross Construction Company has nothing whatever to do with this dredging and is not now doing any work down there at that location.

Exhibit 7 shows the completed stabilized channel of the bank lines as well as the proposed stabilized channel or bank lines. The dotted lines running in a regular curve

on Exhibit 7 passing through the point of dike 602.6 and connecting up with proposed revetment 602.3 and swinging in a regular curve on around the terminal of dike 600.8 is the proposed West bank line in the vicinity of the Yearsley land. The East bank line on the opposite side goes through the terminal of dike 602.7 and the terminal of dike 602.7A and with a regular curve on through dike 601.9 and through the proposed end of dike 601.9A and the proposed end of dike 600.6 and then through the end of dike 600.1 and 600.1A.

Cross-Examination.

At the time the work began on dikes 602.7 and 602.7A there was no well defined channel anywhere in the locality of those dikes. The boats were operating up and down the river daily, but the river shifted back and forth from one side of bars to the other and there was no definite way to know that where you ran one day that you could run there a week from then. I am not saying there was no well defined channel; I am saying I can not point out the well defined channel that existed at that time. There was no well defined channel along the Yearsley land at the location of the proposed channel described in my direct testimony.

Dike 602.7A has been completed to the point that construction has been ordered at this time, but the District Engineer has it within his power and may at any time add any amount on the end of that dike and extend it. I think it has been completed to the length that was proposed or planned at the time the Ross Construction Company contract was entered into. This dike was run out by parts and was not constructed all at one time, because it was as close to the land as we dared go under our plans [fol. 121] and orders and we had to continue our washing at the end of this dike before we could lengthen it out.

The same river condition existed with reference to construction of dike 601.9. It was not built all at one time. However, its extension from time to time did not depend upon any washing with paddle boats, but upon erosion by

the river of the land at the end of the dike, which was out in front of the Yearsley deeded land.

I never saw any paddle boats washing in front of the Yearsley land while I was in charge of construction at that location as Area Engineer. When I say I never saw any paddle boat washing in front of the Yearsley land, I don't mean to say that I never saw any of the Yearsley land go off into the river by reason of the erosion of the stream. Until May, 1936 I had an office in Nebraska City and was down over the job where construction work was in progress at regular times as a part of my duties, which included other projects in addition to the work at Otoe Bend.

VAL CRUME, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Val Crume, 27 years of age, and I have lived in Nebraska City all my life. I was employed by Ross Construction Company from the spring of 1934 until along in June, 1936 as a laborer, mostly as a deck hand on pile driving. I am familiar with the location of the Yearsley land and worked on river projects in the vicinity of that land.

In going to and from work in the spring and summer of 1935 we drove across part of Yearsley's premises. We entered his premises just North of his house and followed the road East down a lane along the South side of his North fence line. This road led into a pasture and we left the pasture through a gate on the East side and drove out towards the river where we parked our cars and walked over to the river bank to be picked up by a boat and taken to the location of our work. Right after we came out of the pasture gate there was a draw that was kind of mud and solid soil and after we got out further it was sandy. The growth on this area consisted of small cottonwood

[fol. 122] trees, rushes and willows. I saw no cultivated crops, nor blue grass or sweet clover on the ground we crossed after we left the pasture gate. The character of the soil from the point where we parked our cars over to the river bank was sandy, fine sand, and the growth thereon was the same, willows, small cottonwood trees and rushes.

In the spring of 1935 we walked North from where we parked our cars to the river bank, later in the summer we walked south approximately 100 yards from where we parked to the place where the boat picked us up. I never saw any blue grass or sweet clover on the ground across which we walked and I would have seen it if it was there.

Cross-Examination.

Some one in our party would open and close the gate every time we went through it because we had orders to always shut every gate. After going through the gate we drove some 200 or 300 yards where we parked our cars. We were always picked up on the Nebraska shore and all the dikes on which I worked began on the Iowa shore.

Gene Thayer, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Gene Thayer and I have lived at Nebraska City all my life. I was employed by Ross Construction Company in connection with the river work in the vicinity of Nebraska City from October, 1933 to July, 1937. I am familiar with the location of the Yearsley land, and crossed the Yearsley premises in going to and from work in the spring and summer of 1934 and in 1935. We went right by his house and through a gate at the yard fence and followed a lane that led to the pasture and went about a half a mile through his pasture and left the pasture by a gate on the East side that let us on the river bank. From the gate we drove 100 to 250 yards out toward the river and

parked our cars and from there walked down to the river bank to catch the boat to take us to work. We usually had a row boat tied down at the bank to row out to the pile driver. When the motor boat picked us up we had to walk about 100 yards from where we parked our cars, but when we used the row boat we walked about 300 yards [fol. 123] in a southeasterly direction. As we came out of the East pasture gate there was a little patch of blue grass about 10 feet wide, but from there on out to the river bank there was not any blue grass or sweet clover and I never saw any cultivated crops of any kind on the land we crossed after we left the pasture gate, and if there had been any cultivated crops at that location in the spring and summer of 1934 and the spring of 1935 I would have seen them. The character of the ground across which we walked was sand, and the growth thereon was mostly bull rushes. The growth on the ground we crossed after leaving the gate to where we parked our cars consisted of bull rushes, willows and a few scattered small cottonwoods and sandburs.

Cross-Examination.

The small cottonwood trees which I referred to were 5 or 6 feet high and the bull rushes were about knee high. The willows out close to the river bank were 7 or 8 feet high. There was as much as 10 feet of blue grass just outside the fence there along the good land. Where blue grass grows, it is better land than sand. I was working down there the day Yearsley locked the pasture gate. At that time we were working on the South dike and used a row boat to get over to our work from the river bank. We could not drive our cars out close to the river bank because we could not get through the sand, and also because the river banks were caving in along there. It was in the late summer or fall of 1934 when we first starting going through Yearsley land and at that time we were working on the dike out to the East of the Yearsley land and the distance we had to row from the bank out to where we were working was never less than 150 feet, but might have been as close as 150 feet sometimes.

FRED OETGEN, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Fred Oetgen, age 29 years, and I have lived in Nebraska City all my life. I was never employed by Ross Construction Company but was employed by the United States Government as a temporary inspector dur- [fol. 124] ing parts of 1934, 1935 and 1936 on river work that was being done by Ross Construction Company. I am familiar with the general location of the Yearsley land and crossed it in going to and from work in the late spring of 1935. In going to work we passed on the North side of the Yearsley house and went through the yard and then East down a lane. We turned through woods and left the Yearsley pasture through a wire gate on the East side and came out on a sand plateau on the edge of the river. When the weather was permissible we drove our cars about 100 yards from the gate before parking and from there we walked to the bank of the river to be taken by a boat to the job. In the late spring of 1935 we walked in a southeast direction from where we parked the cars, a distance of about 100 yards to the river bank. The character of the ground we crossed after leaving the gate to where we parked the cars and across which we walked to take the boat was sand and the growth thereon was very sparse, consisting of willows and rushes. There was no blue grass or sweet clover on this ground and I saw no cultivated crops of any kind there and would have seen them if they had been there.

Cross-Examination.

There were some cottonwood trees down there, but I do not recall seeing any to the East of the pasture fence where the gate was.

HARRY WILLHOFT, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Harry Willhoft and I have lived at Nebraska City all my life. I have been actively engaged in the real

estate and loan business since 1932 in southeastern Nebraska and southwestern Iowa. I am field man for the Pitzer Agencies at Nebraska City, which conducts a real estate department and I manage 24 farm properties for the Prudential Insurance Company in our territory. I make the preliminary inspections of farm land in our territory for making all loans by the Prudential Insurance Company and all loans that the Pitzer Agencies have anything to do with.

I was on the Yearsley premises about a week ago. I recall the North Yearsley fence line and the red and white [fol. 125] stake that was set in the ground a short distance South of this North fence line and just within the Northeast corner of the fenced land. From that stake we walked about 180 feet West to a knoll or elevation of land that was about 5 feet above the ground where the stake was set. I stepped off this distance. This higher elevation did not seem to run very far South, but sort of widened out as it went North. There was some timber as we came up onto the bank and the character of the ground immediately East of the bank was practically all sand. I then walked back to the stake above mentioned and started from that point again and went South and a little East along the line where these red and white stakes were set as far as we could walk until I came to a slough. I would judge the distance we walked approximately one-half mile. The general direction we traveled was southeasterly.

We did not cross the slough but went back up the river bank North and a little West to where we had started. I observed the character of the ground across which I had walked and paid particular attention to the growth thereon. I did not see any blue grass or sweet clover or any other cultivated crops on this ground.

Assuming the premises adjacent to the premises over which I walked was of the same general character as the premises I inspected a week ago and that it was sandbar land growing up with willows, bull rushes, and small cottonwoods, in my opinion the fair and reasonable cash market value of that character of land in 1934, 1935, 1936, 1937 and 1938 would be $5.00 to $6.00 per acre.

Cross-Examination.

I had never been on the Yearsley land near the river until a week ago and at that time I went on the land at the specific request of defendant's attorneys and for the purpose of examining it and testifying in this case. The red and white stake above mentioned was the most northerly stake in the Yearsley property. The red and white stake shown in plaintiff's Exhibit 31 is the one which I have reference to and in my opinion Exhibit 31 clearly reflects the stake and brush and trees surrounding it as it existed a week ago.

[fol. 126] (Plaintiff's Exhibit 31 offered and received in evidence as a part of the cross-examination of this witness. The original being attached to this Bill of Exceptions and a photographic re-production thereof is as follows):

[fol. 127] **Plaintiffs' Exhibit 31.**

[fol. 128] I believe I saw the sign and trees shown on plaintiff's Exhibit 32 as we followed along the course of the stakes last week when we were on the premises. Exhibit 32 is a correct representation of the sign and the stake shown in the back-ground, but the trees look a little larger to me on the Exhibit than they did down there on the ground. I would say the view in Exhibit 32 is looking in a northwesterly direction and I do not consider the timber shown therein to be a dense growth. The timber that I referred to as being East of the line I walked was approximately 200 feet from the river bank.

(Plaintiff's Exhibit 32 was offered as a part of the cross-examination of this witness, but excluded from evidence, but was later offered on the rebuttal testimony of Lawrence Yearsley and will be found in this Bill of Exceptions in connection with his rebuttal testimony).

Geo. M. Lathrop, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Geo. M. Lathrop and I have lived in Nebraska City for 53 years and am Vice-President of the First Trust Company of Nebraska City, which is engaged largely in the farm loan and real estate business and is a licensed real estate agent. My work is inspecting premises for the purpose of making loans thereon and handling real estate transactions for clients and I have been so engaged since 1923. Our real estate and loan business extends over all counties in southeastern Nebraska. I have handled 8 or 10 real estate sales transactions in the past year and perhaps a half dozen in 1936. During the past twelve months in connection with the loan business of the First Trust Company I have inspected between 60 and 70 farms and about the same number in 1936.

I am familiar with the Yearsley land and was on that part of the land along the proposed revetment line last week at the same time Mr. Willhoft was for the purpose of inspecting and examining the same. We came upon the premises about the point where the North line of the Yearsley land intersects the water line of the river. I

recall the East and West fence line that ran along the North line of Yearsley property and the red and white stake that was set a short distance South of this fence line. [fol. 129] From that stake I stepped off the distance West to a bank, approximately 5 feet high and the distance from the stake to the bank was about 180 feet. The bank ran in a general southeast direction across the Yearsley premises. From where we stepped up on the bank we could look West and see the Yearsley buildings in the northwest corner of his land. There was some timber East of this bank. We then returned to the stake and from that point walked in a southeast direction along the proposed revetment or channel line, which had similar stakes set at a few points along our route, which further to the southeast went through a 2 to 4 foot wide clearing through the willows. We followed this line approximately one-half mile until we came to a slough, which we could not cross. We then followed up along the river bank to where we came onto the land. As we walked over the land I observed the character of the soil and growth thereon.

Assuming that the land that was adjacent to the present river bank was of the same general character as the land which we walked across and that it was sandbar land grown up with willows, bull rushes, weeds and scattered cottonwoods, in my opinion the fair and reasonable cash market value of that character of land in 1934, 1935, 1936, 1937 and 1938 would be $5.00 per acre.

Cross-Examination.

Pasture land is of value to farmers in Southeast Nebraska and I would say farm land with pasture has more value than farm land without pasture.

I had never been on that portion of the Yearsley land East of the proposed revetment line prior to last week. In giving my opinion on value, I took into consideration that it was sandbar land. My opinion of the value of the land would be changed if I had seen blue grass, sweet clover or corn, which in the year 1934 made 35 to 40 bushels of corn per acre, growing on the land. The stake shown in plaintiff's Exhibit 31 is the kind of stakes that we saw along the revetment line, but I would not say that I saw

the stake shown in said Exhibit 31 because the ones I saw were in the lane or clearing that was cut through the brush and willows.

[fol. 130] I do not think the stake shown in plaintiff's Exhibit 31 is the one just South of the Yearsley North fence line from which we started. I would not say that the sign shown in Exhibit 32 was the one I saw, but I did see a sign similar to it. I do not recall that there was as much undergrowth on the land as is shown on Exhibit 32.

(B. E. Dodds, who previously was sworn and testified on behalf of defendant, was recalled and identified a number of exhibits as "Employees Agreement and Record Cards" that were signed by each member of the labor party, under his supervision in cutting timber from June 1 to June 5, 1937 and also identified the daily labor reports of these men in this labor party for each of said days which were made out by the witness and sent to the Area Engineer at Auburn, Nebraska, and it was stipulated by counsel that these laborers were paid by the United States Government for the labor performed by them in cutting trees from June 1 to June 5, 1937. These numerous exhibits would be an encumbrance of the record on this appeal and are, therefore, not included in this Bill of Exceptions).

CLAUDE C. VOTAPKA, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Claude C. Votapka and I live at Onawa, Iowa. I am Assistant Engineer in the War Department, Corps of Engineers, and have worked for the Government since 1923. I am now Assistant to the Area Engineer at Onawa on Missouri River improvement work. During the whole time I have been with the Government, with the exception of one year, I have been working on the Missouri River. I was Assistant to Mr. C. C. Cook, Area Engineer, on the river work in the vicinity of Hamburg and Otoe Bends from 1934 to the spring of 1936 and during that time was stationed at Nebraska City. As Assistant to the Area Engineer I carried out his orders and made inspec-

tions with him and under his direction of work being done under the contracts in that area.

I walked over and examined several different times the revetment 603.9 shown on Exhibit 7 on the left bank and [fol. 131] on dikes between there and dike 601.9 shown on said exhibit that were constructed prior to the summer of 1936. All the dikes in that area were completed during the time I was there except a portion of trail dike 602.7A and an extension of dike 601.9, which had been built out about 3000 feet from the Iowa shore before I left there. It was my duty to see that those dikes were constructed in accordance with my directions and the plans and specifications, and to see that the special orders of the Area Engineer were carried out with reference to extending construction or stopping construction on those structures whenever it was ordered. During the time I was there the work on several dikes was stopped at various times by the orders of the United States Area Engineer, and then no further work on that structure could be done by the contractor until the United States Area Engineer gave orders to proceed with the work. I was on the work several times each week inspecting it to see that it was being done in accordance with the orders, plans and specifications, and as far as my knowledge of the plans, specifications and work orders is concerned, what I saw of the work, it was being done in conformity with the plans and specifications and the work orders as I knew them.

During the construction of dike 602.7 I was present on the work several times each week until it was completed and I saw no washing done at the end of that dike, but there was washing done at the end of trail dike 602.7A. The contractor was ordered by the Area Engineer to wash the bank opposite the end of trail dike 602.7A during its construction in order to maintain a navigable pass at the end of the dike. This washing was done approximately a quarter of a mile North of the Yearsley North property line. I saw no washing done along the Yearsley land. I was there during construction of approximately the first 3000 feet of dike 601.9 and I never at any time saw that dike built up against the Yearsley land, nor the end of that dike nearer than 150 feet to the Yearsley land.

Cross-Examination.

I never measured the distance between the end of dike 601.9 and the Yearsley bank, but I walked along the bank and saw the end of the dike and my estimate of distance from the end of dike to the river bank would not be off [fol. 132] more than 10 or 20 feet. When construction on dike 601.9 was stopped, we were as close to the Yearsley bank as we were allowed to go under orders. I stood on the edge of the Yearsley accretion land and the end of the dike was about 150 feet from me. But there was never any washing at the end of that dike on the Yearsley land while I was there.

Redirect Examination.

When I walked along the bank on the Yearsley land I observed the kind of soil that I was walking on and it was very fine sand, commonly called sandbar, and the growth on it was small scattered willows.

Hugh R. Maxwell, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Hugh R. Maxwell and I have been employed by the United States Government War Department for 9½ years as an Inspector and Junior Engineer. I have been Junior Engineer since the winter of 1934 and prior to that time was Chief Inspector on contract work. I was Chief Inspector for the United States Government from September, 1933 to June, 1936 on the Missouri River improvement work that was being done under the Ross Construction Company contract in the vicinity of Nebraska City and the Yearsley premises. I assigned inspectors to take shifts as the work progressed and also made daily detailed inspections of the work myself.

In connection with the commencement of any particular structure, the survey party would put in the line stakes

and establish a Zero station, and I would designate to the contractor's Foreman where to start driving the first piling. I was present at the starting of each dike shown on Exhibit 7 in the area below Nebraska City that was started or constructed during the time I was Chief Inspector and directed where it should be started, and as the work progressed I observed and saw on my daily inspection trips that the contractor kept on the line staked by the survey party.

Dike 602.7 shown on Exhibit 7 was commenced and completed during the time I was Chief Inspector for the [fol. 133] Government. I was on that dike several times each day during its construction. I knew the plans and specifications for the work on that dike and from my observation on my daily inspections, over objection of plaintiff that it constituted no defense to plaintiff's cause of action and was immaterial, the witness testified that the work was done in strict accordance with the plans and specifications and work orders.

Trail dike 602.7A was also commenced and completed during the time I was Chief Inspector and I was on the location of that structure every day and observed the work as it progressed. It was my duty to be there for that purpose and over objection of plaintiff that it constituted no defense to plaintiff's cause of action and was immaterial, the witness testified that trail dike 602.7A shown on Exhibit 7 was constructed and completed in strict accordance with the plans, specifications and work orders.

I was Chief Inspector at the time dike 601.9 shown on Exhibit 7 was commenced and I directed the location of the point at which it started on the Iowa bank, and was Chief Inspector during the construction of the first 3,380 feet of that dike. I was on the location of that dike every day during the construction of that portion that was built prior to June, 1936 and observed the manner in which the work was progressing on my daily visits, and over objection of plaintiff that it constituted no defense to plaintiff's cause of action and was immaterial, the witness tes-

tified that from my observation that portion of dike 601.9 which was built prior to June, 1936, which was the first 3,380 feet of that dike and carried out to Station 33 plus 80, was constructed in strict accordance with the plans, specifications and work orders. I never saw any washing done at the end of dike 601.9 on any of the occasions when I was there, which would be twice a day or more often. If there had been a paddle boat washing at the end of that dike at any time I was there, I would have noticed it.

I did see washing done on the construction of trail dike 602.7A on the right or opposite bank from the end of that dike. This washing was done about a quarter of a mile North of the North line of the Yearsley property, but I never saw any washing being done against the Yearsley [fol. 134] land at any time while I was Chief Inspector from September, 1933 to June, 1936.

During the time I was on this job as Chief Inspector I crossed the Yearsley land a few times along the North boundary line and was on the land adjacent to the river bank. The character of the ground was sand and some gumbo. The growth consisted of bull rushes and small willows close to the bank. I never saw any blue grass, sweet clover or cultivated crops on the portion of the Yearsley land I was on. Of course, I was not looking for blue grass and there may have been some further back from the bank, but there was none out close to the river bank because it was too sandy.

The trail dike 601.9A was not authorized or constructed during the time I was Chief Inspector. Any changes or modifications made in the structures are under written order from the District Engineer through the Area Engineer.

Cross-Examination.

I was right on the river bank on the Yearsley premises at times and other times was back as far as his house and on the way from his house out to the river. My testimony with reference to the character of growth was on the ground within 200 or 300 feet of the river bank.

I was on the "Judge Ross" several times while it was washing at the location at the end of dike 602.7A and was there to see that it did wash.

Redirect Examination.

This washing was about a quarter of a mile upstream from the Yearsley land and it was part of my duty to be there and see that the contractor did the washing at that point, as I had orders from the Engineer to wash that bank and I went down there to see that it was being washed.

EDWARD O'ROURKE, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Edward O'Rourke and I have been Inspector with the United States Government on River improvement work for 5½ years. I was Chief Inspector for the Gov- [fol. 135] ernment on the Ross contract at Otoe and Frazer bends on the Missouri River from July 10th to the latter part of August, 1936. I was familiar with the plans and specifications under which the work was being done. During that time dike 601.9 was extended from the point where Mr. Maxwell had been Inspector to a distance of about 3,570 feet, or about 190 feet farther on out.

During the construction of that extension of dike 601.9 I was on the location of the work at least twice every day and over objection of plaintiff that it was immaterial, in no way constitutes a defense to plaintiff's cause of action, or justifies the taking of his property without compensation or without due process of law, the witness testified that from my observation that extension was constructed in strict accordance with the plans, specifications and work orders. During that time I did not see any washing at the end of dike 601.9 and if there had been paddle boats washing at the end of that dike, I would have seen them.

At that time dike 601.9 was authorized to a length of 3,570 feet and was completed, and it was from that point

that the 419 foot extension was later authorized and constructed.

During the time I was Chief Inspector on dike 601.9 I was on the Yearsley land at the bank of the river opposite the dike several times. I also walked over the revetment line as staked on the Yearsley premises to familiarize myself with its location, and I have walked down the river bank on his premises at different times. In walking over the proposed revetment line the character of the ground which I observed was largely sandbar, some gumbo, nearer the river bank it was mostly sand. I observed the area between the revetment line and the river bank and the growth in that area was considerable willows and bull rushes and some cottonwood timber from 4 to 12 inches. During the time I was Chief Inspector on that job I did not see any cultivated crops, blue grass or sweet clover growing in the area between the proposed revetment line and the West bank of the river on the Yearsley premises.

I am familiar with the location of the Yearsley North fence line and was on the Yearsley premises again on May 17, 1938 for the purpose of taking a cross-section from the [fol. 136] revetment line to the river bank and from the revetment line back to the higher ground. I am also a surveyor and I made one cross-section at Station 17 plus 10 of the proposed revetment 602.3, which station is 138 feet South of the Yearsley North property line and at which point there is a stake set on the proposed revetment line. From this point or stake I measured East to the river bank a distance of 203 feet, and from this stake I also measured West approximately 1500 feet to the second high bank or what might be called the high bank in the river bottom. I also made measurements to determine the height of this bank with reference to the station from which I had started my measurements and found that there was a difference of approximately 7 feet in elevation between this second high bank and the station. This bank is about half way between the timber line and the Yearsley buildings at the Northwest corner of the farm and is back in a wheat field. A distance of 200 feet West of the station or stake from which these measurements

were made there is another secondary bank which is approximately three feet higher than the elevation of the station.

I made another cross-section at Station 27 plus 10 on the proposed revetment line which would be 1000 feet South of the station from which the first cross-section was made. This second cross-section was made at right angles to the revetment line which at that point ran in a southeasterly direction and the cross-section was run to the river in front of the revetment line and back into the cultivated field behind the revetment line. From this Station 27 plus 10 to the river bank, at right angles to the revetment line, was a distance of 185 feet and I measured back from said Station 27 plus 10 at right angles to the revetment line a distance of approximately 2000 [—] without hitting the high bank to which we had measured from the other station 1000 feet North on the revetment line.

Cross-Examination.

From Station 17 plus 10 on the revetment line the ground gradually slopes down to the foot of the secondary bank which is 200 feet West of that station. The foot of this [fol. 137] secondary bank is approximately a foot lower in elevation than Station 17 plus 10, so that the height of this bank is about 4 feet. From this first high bank or secondary bank the ground gradually slopes downward toward the West to the foot of the second high bank, which was approximately 1500 feet West of the Station 17 plus 10. The incline from the foot to the top of this second high bank is between 5 and 7 feet. It is not an abrupt bank, but is a short slope. In measuring back of the revetment line at Station 27 plus 10 there was no well defined intermediate or secondary bank, but there were slight raises and shallow draws and an old slough we crossed in measuring the 2000 feet back from Station 27 plus 10 at right angles to the revetment line. When I was on the land in 1936, I was not there to be estimating size of trees or looking for cultivated crops.

ARLIE J. GREGORY, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Arlie J. Gregory and I am employed by Ross Construction Company as a Missouri River pilot on their boat "Judge Ross" and have been employed by said Company since April 28, 1930. I hold a first class pilot's license issued by the Steamboat Inspection Service of the Department of Commerce of the United States and have been navigating the Missouri River as a pilot since July, 1925 and from 1917 to 1925 I was employed on boats as a deck hand.

The first time I navigated the section of the Missouri River covered by the Ross contracts, Exhibits 9 and 10, was in the fall of 1933 when we came up the river to begin work and I have remained on this job ever since. I am familiar with the course of the Missouri River at Otoe and Hamburg Bends for the purposes of navigation. Ever since we have been working in that vicinity I have navigated that stretch of the river as high as four or five times a day and there never has been a time for longer than two or three days that I have not been over it at least twice a day. In making these trips up and down the river past the Yearsley premises, I would be towing barges loaded with rock and lumber to take them to the location of the [fol. 138] job. When I came up the river the first time in September, 1933, which was before any construction work had been done, the navigable river came up the Nebraska shore where dike 597.2 is located at the lower end of Exhibit 7, and I followed the Nebraska shore on up to a point where dike 600.8 is located on said Exhibit. At that point I left the Nebraska shore and turned in a northeasterly direction to within about 800 feet of the Iowa shore, and from there I made a short turn which carried us in a northerly direction on up to where dike 601.9 is now located at a point about 800 feet from the Iowa shore, and from there straight on to the foot of the Frazer Island. When we went through where 602.7 is now located, we were approximately 800 feet from the Iowa shore. From the foot of Frazer Island we ran along the East side of Frazer Island on up to Nebraska City.

The next time I was down the river past the Yearsley premises was in March, 1934, before any work was done in that vicinity, and on that trip I proceeded in a southwesterly direction past the foot of Frazers Island, and below the foot of Frazer Island I ran about 800 to 1000 feet farther over towards the Nebraska shore than I had in coming up in September, 1933. In March, 1934 the navigable channel at the point where dike 602.7 is now located had moved approximately 1000 feet West or closer to the Nebraska shore than it was in September, 1933. The next time I navigated the river in the vicinity of the Yearsley land was when I began work down there in June or July, 1934, and from that time on I was down there every day that any work was going on and the course of the river gradually worked toward the Nebraska shore.

Pursuant to orders received by me I began paddle washing with the "Judge Ross" on the morning of October 23rd on the bank opposite the end of dike 602.7A at the time that dike was about 1000 feet long and I continued washing at that location until I was ordered to quit on the evening of November 25, 1934. I never did any other washing in that vicinity, nor did I ever wash at the end of dike 601.9 or out in front of the Yearsley property. The washing I did was North of the Yearsley property. In this washing operation we constructed fastenings out on [fol. 139] the land and extended lines from the stern or back end of the boat to these fastenings on the bank and in this manner held the stern end of the boat, where the paddle wheel was located, up against the bank. No one but myself has ever operated the "Judge Ross" since the time we came up to work on this job.

I lived on the boat and during the time I was doing this washing I would get out on the land in the evening after work and walk around and during that time walked out on the Yearsley land a number of times. The land out in front of the Yearsley deeded property in 1934 was sandbars of a medium height, 4 to 5 feet higher than the stage of the water at that time, and had a growth of willows, small cottonwoods and some rushes on it. I was also out on the Yearsley land several times in the summer of 1935

and have been back on his land as far as where the proposed revetment line is staked out and have been toward the lower end of his land as far as where the revetment line crosses the slough. The character of the ground in this area between the proposed revetment line along the Yearsley premises and the West bank of the river was nothing more than a medium high sandbar. There were a few spots of gumbo, but the main part of it was sand and it was all underlaid with sand that showed along the edge of the bank. I never saw any corn, sweet clover or blue grass growing in that area during any time I was there in 1934, 1935 and 1936. The character of vegetation on that area was weeds, willows, cottonwoods, some rushes and wild grasses. During June, 1935 this area of land East of the proposed revetment line in front of the Yearsley deeded land was covered by the waters of the Missouri River and was again covered by said water in March, 1936 and also in the latter part of June or early July, 1936.

Cross-Examination.

I did see some gumbo toward the lower end of the accretion land along the Yearsley place. It is possible there could have been brome grass there and I would have classified it as wild grass. The letter "Z" on Exhibit 7 marks the approximate location of where I turned in a northeasterly course when I came up the river in September, 1933 and the line drawn on said Exhibit in green from "Z" to "Y" marks the approximate course I traveled on [fol. 140] my first trip up the river at that location. It marks one of the main water channels at that time and the one which I followed. At the point on Exhibit 7 marked "W" there was another channel coming in from the West side of Frazers Island at that time. It was carrying approximately the same amount of water as the East channel, but I chose to run the East side of the Island. The line from "W" to "Z" carried the main portion of the water at that time and appeared to be the easiest course to navigate. By March, 1934 this course had changed 800 to 1000 feet West from the line shown on Exhibit 7 below the point marked "W".

Redirect Examination.

The line in brown from point "Y" on Exhibit 7 to where it intersects the line "Y" to "Z" on said Exhibit is the approximate route I took in navigating the river at that point in March, 1934. In March, 1934 when I came down, a small portion of as many as four dikes above Frazers Island had been constructed and a small portion of two located at miles 605.4 and 605.3 on the Iowa shore. For a distance of at least 1000 feet West of the course which I navigated in September, 1933 in that vicinity there was at that time a series of real low bars with chutes of water between them and from there on toward the West side it appeared to be one moderately high sandbar.

Recross Examination.

The channel I was navigating when I came up the river in 1933 at this locality was about 500 feet wide and this low bar began at the West edge of this channel and extended westward a distance of approximately 1000 feet and the moderately higher sandbars were on West of that.

DALE HENRY, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Dale Henry and I am Junic. Engineer with the United States Government working out of Onawa, Iowa office. I have held that position since the fall of 1934 and prior to then was survey man with the United States Engineers' office from March, 1929. I am familiar with the [fol. 141] location of the Yearsley land and did some surveying on that land at various times from 1933 to 1934. My first surveying on that land was laying out what is known as a traverse or preliminary staking for dikes and revetments in connection with Missouri River improvement work in that locality. A traverse line is one of our control points to which all our dikes, revetments and topography is referred. This traverse or control line is in-

tended to be behind or shoreward from the structures to be constructed, as it is put as near as possible to land that would be referred to as a second or intermediate or high bank. Our traverse lines extend the full length of the Missouri River banks from one end to the other and, of course, would have to cross the Yearsley property. The traverse line is located to the West of the proposed revetment line on the Yearsley land.

I had supervision of the survey party that staked out the proposed revetment line across the Yearsley premises. This proposed revetment line is shown by the cross-hatched line on Exhibit 7 beginning at revetment 602.3 on the West bank and extending in a curve to the South and East across the Yearsley premises. In staking this proposed revetment line we had to clear the vegetation in the line of our survey so we could see through. The path cleared by the survey party was about 4 to 5 feet wide. The character of the growth which we had to clear for this purpose was small cottonwoods, willows, brush and possibly a tree or two on the revetment course. I have walked over most of the Yearsley land lying between this revetment line and the river bank at various times. I was over that area of land in August, 1933 with the survey party and several times since then, for the purpose of recording notes pertaining to the cutting of the bank in order to determine from time to time the action of the river.

The character of the soil was mostly sand, possibly a little black dirt in with it, and the growth on it was mostly willows, small cottonwood trees and brush. I do not recall seeing any crops, blue grass or sweet clover East of the revetment line on the Yearsley premises in October, 1933, or at any time that I was down there.

[fol. 142] From the lower end of the proposed revetment 602.3 shown on Exhibit 7 we cleared and staked a dike line that extended approximately 1000 feet continuing right on southeast from the revetment clearing. I was doing this work for the War Department, United States Engineer office. The opening through the willows shown on Mr. Shannon's plat, Exhibit 5, along the South line of

the Yearsley property does not run in the direction of the revetment line which we staked out and also appears to be further West than the revetment line would be in relation to the Yearsley land.

Cross-Examination.

I believe the survey party did at one time cut some corn on the Yearsley premises along the traverse line as I know there was some corn cut in that locality by the survey party on the traverse line. As I recall it the traverse line fringed along the East side of a corn field near the South part of the Yearsley land. The traverse line is not shown on Exhibit 7 but only the revetment line is shown thereon. When I was testifying about whether there were any crops that I saw or didn't see East of a revetment line, I was thinking of a line that would appear considerably to the East of the place marked "open space" on Mr. Shannon's map, Exhibit 5.

Redirect Examination.

The traverse line is an entirely different line than the revetment line and is run for a different purpose. The revetment line shows the location of the proposed work and the traverse line is for control in establishing that work. The revetment line on the Yearsley premises is no where near the corn I was referring to that was cut by the survey party on the traverse line. The point where the corn was cut on the Yearsley premises was 1000 feet or more West of the revetment line.

Laurence H. Hart, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Laurence H. Hart and I am a survey man [fol. 143] with the United States Engineers Office at Onawa, Iowa. I have been Chief of Surveys for the past year and prior to then had been surveying for the United

States Engineers since 1932 in connection with Missouri River improvement work. I was in the survey party that surveyed the revetment line 602.3 and located the traverse line across the Yearsley premises in 1933, and we also made many other surveys of dikes in that locality. I worked in that area from 1933 until May, 1936. Some of the survey hubs on the revetment line on the Yearsley premises had been destroyed or rotted or covered up and we re-staked the lower end of that line in 1936. I have been over the Yearsley ground, where we staked our lines, several times a month from 1933 to 1936 and have also been over the Yearsley land between the revetment line and the river bank several different times. The character of the land in that area between the revetment line and the river bank is sandbar and the growth thereon in 1933 was willows, bull rushes, brush and small scattered cottonwoods. I at no time saw any cultivated crops or blue grass of sweet clover on that area of the Yearsley land lying between the revetment line and the river bank.

Cross-Examination.

Close to the revetment line there were cottonwood trees up to 12 inches in diameter and perhaps 20 to 30 feet high, but out near the river the cottonwood trees were only about 6 feet high and a few inches in diameter.

EARL M. WALKER, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Earl M. Walker and I have been survey man for the United States Engineers office since May, 1930. I was a member of the survey party that staked the proposed revetment line across the Yearsley premises in the fall of 1933 and also did some surveying on the Yearsley premises several times during 1934 and 1935. At the time we staked the revetment line across the Yearsley premises we cleared a path to an average width of about 4 feet and the growth which we cleared was cottonwood timber, brush.

and dogwood trees. I have been over the entire area of the [fol. 144] Yearsley land between the staked out revetment line and the river bank on an average of twice a month during the time I worked there from 1933 to 1936 and I never saw any cultivated crops, blue grass or sweet clover growing on that area at any of those times. The character of the soil in that area was a high sandbar with patches of gumbo mixed in and the growth thereon was scattered small willows and a few small cottonwoods, weeds and brush. The traverse hub that was set in the edge of the corn field on the Yearsley land was approximately 2500 feet West of the proposed revetment line.

Cross-Examination.

The general direction of the traverse line across the Yearsley premises is North and South. I do not know exactly the direction the traverse line runs without looking at a map. I cannot be certain as to the exact location of the traverse point about which I testified without looking at a map, but I don't believe it is located over on the accretion land. It does not swing to the East where the revetment line curves to the Southeast.

R. L. Hale, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

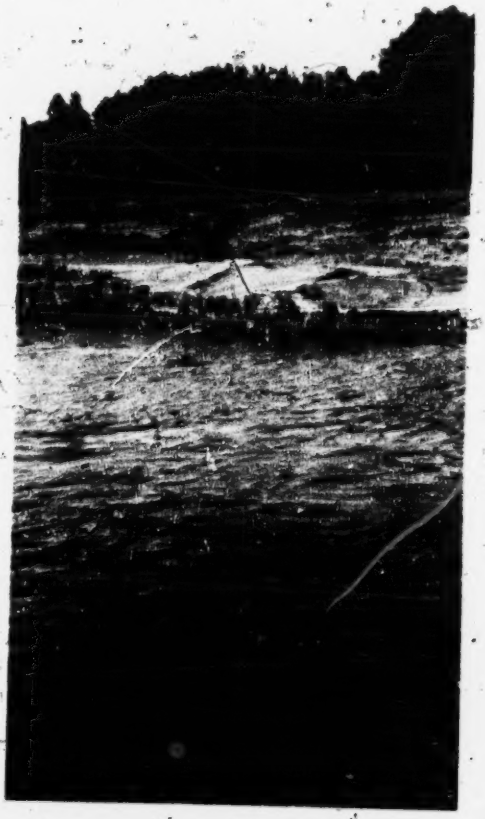
My name is R. L. Hale and I live at Nebraska City and have been employed by the Ross Construction Company since 1929. I have been in charge of the office work at Nebraska City for said company since 1933. I first became familiar with the eastern portion of the Yearsley premises in the summer of 1936 when I was along the proposed revetment line across said premises. I was on that portion of the premises again in 1937 and in 1938. I was over the area of the Yearsley land lying between the revetment line and the river bank once in 1936 and twice in 1937. At that time the character of the soil in that area was sandbars and the growth consisted of small willows and weeds. I never saw any cultivated crops, blue grass or sweet clover growing in that area at any time I was there.

Defendant's Exhibits 47, 48, 49 and 50 are kodak pictures taken by me in September, 1937 of the Yearsley prop-
[fol. 145] erty along the river front. The pictures were taken from a boat out in the river a short distance from the shore. Exhibit 47 is a view taken near the Yearsley North property line and the other Exhibits 48, 49 and 50 are views taken in the order in which they are numbered as I proceeded on South downstream along the Yearsley premises, the last picture, Exhibit 50, being taken a little over 1000 feet South of the Yearsley North property line.

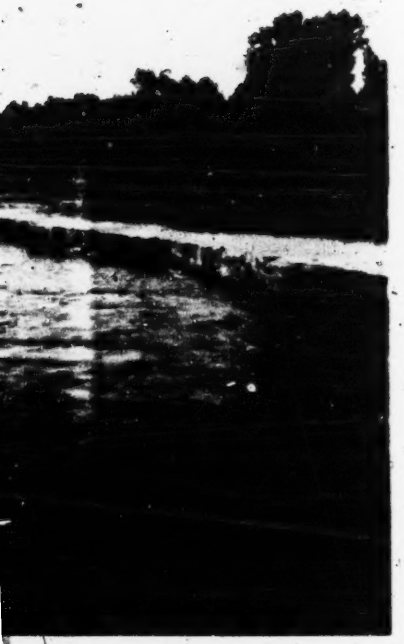
(Exhibits 47, 48, 49 and 50 were offered and received in evidence, the originals being attached to the Bill of Exceptions and duplicate prints from the negatives thereof are as follows):

Defendant's Exh. 47.

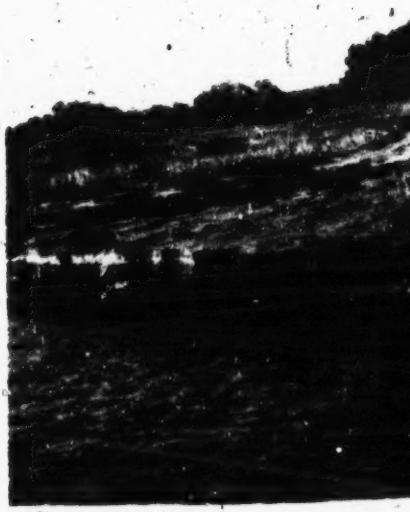
Defendant's Exh. 48.



Defendant's Exh. 49.



Defendant's Exh. 50.



[fol. 147] The no-trespass sign board nailed to the tree in the foreground of Exhibit 47 is about 150 feet South of the North line of the Yearsley property. Along the bank shown on Exhibit 47 is a sandbar without any growth on it and back of that the growth is practically all weeds and some rushes and willows clear back to the timber shown in the picture.

The light colored patch on Exhibit 48 represents sandbar on which nothing is growing and immediately back of that there are weeds and rushes and the higher growth is willows, probably as high as a man's head.

Exhibit 49 shows a strip of sandbar along the river bank and further back of rushes and willows.

Exhibit 50 shows bare ground along the river front, but not so much sand; it is darker ground with willows and rushes in the background.

Cross-Examination.

The darker ground shown on Exhibit 50 is commonly called gumbo.

Paul Jessen, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

Direct Examination.

My name is Paul Jessen and I live at Nebraska City. I purchased the Yearsley land on April 12, 1938 from Mr. Lawrence Yearsley and he had purchased the other 2/3rds interest of this land from his brother and brother-in-law either the same day or the day before we traded. The W. A. Ross Construction Company had no knowledge of or interest whatever in my trade with Mr. Yearsley.

Cross-Examination.

In our transaction Mr. Yearsley expressly reserved his right to maintain this suit.

"Mr. Dierks: The defendant, Ross Construction Company, now rests.

Mr. Van Pelt: Plaintiff at this time moves separately to strike each of the Exhibits numbered 9 to 46 inclusive except Exhibit Number 31, for the reasons given in the objection thereto.

The Court: Overruled.

Exception allowed to Plaintiff.

[fol. 148] Mr. Van Pelt: We wish the motion to be shown separately as to each Exhibit. We now move the Court to strike all testimony relating to the contracts, Exhibits 9 and 10, or any work orders pertaining thereto, which have been introduced in evidence, for the reasons given in the objections to the testimony as the same were introduced.

The Court: Overruled.

Exception allowed to Plaintiff."

"Mrs. Dwyer: I would like at this time to get leave, in view of the distinction that has been made between what they call the deeded land and the accretion land, to amend the petition by interlineation, in paragraph 2 by adding after the words "250 acres of land" right after the word "land", adding in "and accretions thereto to the Missouri river" in section 31, township 8, range 15.

Mr. Rogers: Now, the defendant; Ross Construction Company, objects to that proposed amendment, and desires to be heard upon it, to be heard upon the objection."

Whereupon the Jury was excused and arguments had on plaintiff's motion to amend and defendant's objection thereto which was based upon the ground that the land described in plaintiff's petition and on which his cause of action for damages was based, was confined to 250 acres of land, being the deeded tract and in no manner included any other land beyond that, and throughout the trial of this case defendant, Ross Construction Company, had consistently preserved an objection to all questions that concerned any damage to or taking of any land beyond the 250 acre deeded tract as being immaterial and not within the issues of this case.

"The Court: Well, I think I can defer ruling on this until we get through; it won't change anybody's procedure from now on in hearing the evidence, I take it; and the question will be reserved for the present."

Plaintiff's Rebuttal Evidence.

LAWRENCE YEARSLEY, plaintiff, having heretofore been duly sworn, testified in rebuttal on his own behalf in substance as follows:

[fol. 149] Direct Examination.

The East pasture fence line along my land has been moved twice since 1933. Prior to the time the fence was moved it was better than one-half mile East of the Northeast corner of the deeded land. The first time I moved the fence back was in 1934 when I moved it back about a quarter of a mile and then I moved it back again in 1937. Before the fence was moved back, it ran in a South direction and a little bit East and after I moved it back it still ran in a southeasterly direction, rather than in a straight North and South line, because I nailed it to the trees.

The gate on the East fence line is about 100 to 125 feet South of the North line of my property. The cottonwoods which I referred to in my direct examination that were cut, some were cut the first part of May, and later, in July. I fix the first part of July because I served a restraining order on the Ross Construction Company in this case and stopped them.

I took the pictures, plaintiffs' Exhibits 31 and 32, on last Sunday morning. Exhibit 31 was taken about 50 to 55 rods South and a little East of my North property line. Exhibit 32 was taken a little over 100 yards South and little bit East of my North property line and shows an area right near the East line of the deeded land. At the time I took Exhibit 32 I was standing in the North end of the volunteer wheat field right South of the cottonwoods and was looking North and a little bit West. The white line

where the letter "B" has been marked on the Exhibit No. 32 is a stake stuck in the ground at that point.

Plaintiff's Exhibit 32 was offered and received in evidence, the original thereof being attached to this Bill of Exceptions and a photographic re-production thereof is as follows:

[fol. 150] Plaintiffs' Exhibit 32.

[fol. 151] The area which has been pointed out in defendant's Exhibits 47, 48 and 49 as being sand, was in June, 1934 and prior thereto, heavy black soil, mostly gumbo. In the year 1934 prior to the month of June, sand was not visible in the locations shown in Exhibits 47 and 49. At that time I had blue grass and sweet clover in that area and this accretion land was first flooded in June, 1935. I did not count how many more were in the party that cut cottonwood trees in July of 1937, but by the look of them there were 20 or 25.

Plaintiffs thereupon rested.

Thereupon at the conclusion of all the evidence, the defendant, W. A. Ross Construction Company, filed and presented four separate written motions for a directed verdict, which are as follows:

"At the close of all the evidence, the defendant herein, W. A. Ross Construction Company, moves the Court to withdraw from the consideration of the jury, and enter a judgment in favor of this defendant, on the claim in plaintiff's Petition for damages for cutting and destroying cottonwood trees, for the following reasons:

a. Because there is no evidence in the record that any trees were cut or destroyed on the land mentioned and described in Plaintiff's Petition;

b. Because the evidence conclusively shows that no trees on any of the land of Plaintiff were either cut or destroyed by either the defendant herein, or any of its agents, servants or employees, but was the work of the United States through its Army engineers over whom this defendant had no control;

c. Because if the cutting of the trees on plaintiff's land constitutes a taking of private property for public use within the meaning of the Constitution of the United States, then the Court of Claims is the proper tribunal in which Plaintiff should seek redress;

d. Because any damages Plaintiff may have sustained in the cutting of such trees is a consequential damage and the result of the exercise of the dominant right of the United States government to improve the Missouri River for the purpose of navigation."

* * * * *

"At the close of all the evidence, the defendant herein, W. A. Ross Construction Company, moves the Court to withdraw from the consideration of the jury, and enter a judgment in favor of said defendant, on the claim for damages set out in Plaintiff's Petition, based on the washing-away of Plaintiff's land by the boats of the defendant, for the following reasons:

a. Because the evidence conclusively shows that no such washing-away was done by this defendant or its agents or servants or employees on any land mentioned and described in Plaintiff's Petition;

b. Because the evidence conclusively shows that whatever washing-away of land there was, was all done North of Plaintiff's land, and under the direction of the Engineers of the United States War Department for the purpose of improving the Missouri River for navigation;

[fol. 152] c. Because if such washing-away was done on Plaintiff's land, it constitutes an indirect and consequential damage to which such land was subject because of the dominant right of the United States to improve the Missouri river for navigation;

d. Because if such artificial erosion constitutes a taking of private property for public use within the meaning of the Constitution of the United States, a Court of Claims is the proper tribunal in which Plaintiff should recover his damages, and an action in tort will not lie against the United States or its agents or subsidiaries for such taking."

* * * * *

"At the close of all the evidence, the defendant herein, W. A. Ross Construction Company, moves the Court to withdraw from the consideration of the jury, and enter judgment in favor of said defendant, on the claim set out

in Plaintiff's Petition alleged to have been caused by damages of overflow to his land not taken for the following reasons:

a. There is no evidence in the record that the land of Plaintiff mentioned and described in the Petition has been flooded by any act of this defendant;

b. There is no evidence in the record on which the damages to any land flooded by the Missouri River can be determined by the jury."

* * * * *

"At the close of all the evidence, the defendant herein, W. A. Ross Construction Company, moves the Court to instruct the Jury to return a verdict in favor of said defendant, and to enter a judgment in favor of said defendant, for the following reasons:

a. Because there is no evidence in the record that any of Plaintiff's land mentioned and described in his Petition has been either taken, damaged or destroyed by this defendant.

b. Because if any of Plaintiff's land or property was either damaged or destroyed by this defendant, it was done by said defendant while acting as agent of the United States, and pursuant to an Act of Congress authorizing the improvement of the Missouri river for the purpose of navigation, and was an indirect or consequential damage due to such work, for which neither this defendant nor the United States government is responsible;

c. Because if any property of Plaintiff herein has been taken for public use, within the meaning of the Constitution of the United States, Plaintiff's redress for such damages is in the United States Court of Claims, and not in an action for damages in this Court;

d. Because under the pleadings, the evidence and the law, the Plaintiff is not entitled to a judgment against this defendant for any amount of damages alleged to have been sustained by him."

* * * * *

"The Court: I will overrule the motions for directed verdict, and submit the case to the jury. Note an exception.

Exception allowed to Defendant.

The Court: At the close of all the evidence, the plaintiff's motion to amend the petition is sustained.

[fol. 153] Exception allowed to Defendant."

Thereupon the defendant, W. A. Ross Construction Company, presented four separate instructions requested by said defendant, and the Court reserved ruling thereon and announced that he would make his ruling thereon by the instructions that he would give to the Jury.

Said instructions requested by defendant are as follows:

"Instruction No. 1, Requested by defendant W. A. Ross Construction Company.

If the jury find and believe from the evidence that the accreted land that had been washed away before April 12, 1938, consisted of a sand bar or series of sand bars and resulted from deposits made by the Missouri river, and if you further find from the evidence that the river at the place mentioned in evidence, has, from time to time, since 1917 moved over and occupied the location of said accreted lands, and if you further find from the evidence that all of the land washed away before April 12, 1938, was below the ordinary high water lines of said river, and if you further find from the evidence the said river had no set or established channel or water course at the place mentioned in evidence, and was reasonably likely to change its course and wash away the lands in question without the intervention or act of the defendant, then you should return a verdict for the defendant."

* * * * *

"Instruction No. 2, Requested by defendant W. A. Ross Construction Company.

I charge you that under the evidence in the case the dikes 602.7, 602.7-A and 601.9 were constructed by the defendant W. A. Ross Construction Company under and pursuant to contracts between the United States and the defendant

Ross Construction Company. I further charge you that if you find and believe from the evidence that the construction of the dikes was done in accordance with Governmental plans and specifications and under governmental supervision and at the places designated by the government, and if you further find from the evidence that the washing away of any land claimed by the plaintiff was incidental and consequential to the work directed by the government in the improvement of the Missouri, which I charge you is and was a navigable river, for the purpose of navigation, then I charge you that plaintiff cannot recover and your verdict must be for the defendant, W. A. Ross Construction Company."

* * * * *

"Instruction No. 3, Requested by defendant W. A. Ross Construction Company.

I charge you that the Missouri river is and was a navigable river and that the United States has the absolute and unqualified power to improve the river for the purposes of navigation. I further charge you that the government had the right to contract with the Defendant W. A. Ross Construction Company for the doing of such work as the government had the right to do in respect thereto, and if done in such a way that the government would not be liable for damages, then the defendant, W. A. Ross Construction [fol. 154] Company would not be liable in damages.

I further charge you that there are certain injuries which result from improvement of navigation which are known as incidental or consequential and which do not entitle the person injured to any damages. Those damages are such as result from the exercise of the governing authority over the usual and ordinary course and channel of the river.

Therefore I charge you that if you find from the evidence that the construction of the dikes on the east side of the river at the place in question, was for the purpose of improving the river for the purposes of navigation and to stabilize the channel of the river at a place theretofore occupied by it in its usual and ordinary course, then I charge you that the United States would have the right, in such circumstances to make such improvements, and would have

the right to contract with defendant W. A. Ross Construction Company for the performance of such work, and would not be liable in such circumstances to the plaintiff because any injuries resulting therefrom are incidental and consequential."

* * * * * *

"Instruction No. 4, Requested by Defendant W. A. Ross Construction Company.

If the jury finds from the evidence that the dikes and revetment work upon the east side of the river diverted the course of the river against the land claimed by the plaintiff so that in the natural flow of the river the land claimed by the plaintiff would be eroded or eaten away, then you are instructed that the mere fact that defendant W. A. Ross Construction Company made use of a paddle-boat to help the river erode or eat away the land claimed by the plaintiff would not render said defendant liable or responsible to plaintiff."

At the close of defendant's argument to the jury, the defendant, W. A. Ross Construction Company, again presented the written instructions requested by it, which are hereinbefore set forth, and requested a ruling thereon, and the Court thereupon overruled each of said requests and granted an exception to the Ross Construction Company.

Thereupon at the conclusion of arguments to the jury on behalf of plaintiffs and the defendant, W. A. Ross Construction Company, the Court charged the jury as follows:

"Court's Instructions to Jury.

The Court: Gentlemen of the Jury: In this case there are two plaintiffs, Lawrence Yearsley and his brother George Yearsley. They have sued Ross Construction Company whose real name is the W. A. Ross Construction Company, a corporation, whom I will call the defendant.

The plaintiffs allege in their petition that they own an undivided two-thirds interest in 250 acres of land in Section 31, Township 8, Range 15, in Otoe County, Nebraska, and an accretion to the 250 acres extending to the Missouri

river. The defendant admits the ownership by the plain-
[fol. 155] tiffs of land in this action, but denies that they own the total acreage claimed. The plaintiffs allege that for several years past the defendant engaged in construction work in changing the course of the Missouri river, building dikes in the river, and using boats with paddles to wash along the banks of the Missouri river, and in doing that work washed away from the plaintiff's farm about a hundred acres, more or less, having a value of fifty dollars an acre.

The defendant admits that during the time alleged it built dykes in the river, but denies that by such construction work it washed or cut away from the plaintiffs' hundred acres or any part of it, or produced artificial erosion, or changed the course of the river except to confine it between stabilized bank lines as set and defined officially by engineers of the United States in charge of the work for the United States Government. The defendant also denies plaintiffs' allegations of the value of the land alleged to have been destroyed. The defendant alleges as a further defense, in substance, that an Act of Congress authorized an improvement of the Missouri River to be done under direction of the Secretary of War and the supervision of engineers at the place involved in this action and that pursuant to the Act of Congress, the defendant entered into written contracts with the United States for the construction of the work, to be performed according to the contracts and the plans and specifications and the defendant did all its work pursuant to these contracts and specifications and under the direction of the War Department.

The plaintiffs in their petition also set out a claim that the defendant damaged them by reason of cutting down trees which were on this land and evidence has been given relating to this claim. You are instructed that this evidence is not sufficient to show cutting of trees by the defendant, or by its employees so as to justify a verdict against the defendant on this claim and that, therefore, the plaintiffs are not entitled to recover anything in this action against the defendant because of any cutting of trees. The plaintiffs also made the claim in their petition for damages because of the alleged flooding of some of the land about June, 1937. There has been no sufficient evi-

dence to show that this flooding of the land was the result of any act or acts of the defendant, and, therefore, you can allow no damages against the defendant in this action because of any loss from such flooding.

This leaves for your consideration only the question whether the plaintiffs are entitled to recover because of the alleged washing away of parts of the land by reason of alleged acts of the defendant.

Under the pleadings and the evidence in this case it appears that the plaintiffs were the owners at the time in question of an undivided two-thirds interest in 250 acres of land in Section 31, which has been referred to in the evidence as the deeded land and were owners of a like two-thirds interest in a tract of land lying east of the deeded land and this area would be that which was bounded on the west by the east line of the deeded land, on the north by the north line of the deeded land extended east to the Missouri River bank, on the south by the south line of the deeded land extended east to the Missouri River bank, and on the east by the Missouri River bank. There has been evidence of the tendency of the Missouri River to change its channels and its banks from time to time, and hence you are to consider where the river bank was at the time of the destruction of the plaintiffs' land, if any, because of the defendant's acts hereinafter referred to, in determining what acreage of land was east of the deeded land at that [fol. 156] time. When I refer to the river bank as the east boundary, I mean the first bank of the first channel or stream of the Missouri River.

There has been some evidence about the building of dikes and revetments along the Missouri River quite a distance northerly and southerly of the land for whose destruction the plaintiffs are claiming damages in this case. But under the pleadings and the evidence in this case, you are instructed that as to dikes, you are to consider only the dike known as 602.7 and its trailer, dike 602.7-A, and the dike known as 601.9 as shown by the evidence. If you find that as a direct effect of the building by the defendant of the numbered dikes, I have just mentioned, or of the building of one or more of them, or that as the direct effect of the

process of washing done by the defendant's boats, done by anchoring or holding the boats in place and revolving the paddle wheels near to and forcing the water against the land of the plaintiffs, or that as the direct effect of such washing combined with the direct effect of the building of the numbered dikes, or some of them, which I have mentioned, the waters of the Missouri River were forced against the plaintiffs' land and caused the land to fall into the river and be washed away, so that the use of such land was permanently destroyed and permanently lost to the plaintiffs, then the plaintiffs would be entitled to recover a sum equal to two-thirds of the fair and reasonable cash market value at the time of its destruction of the land which was so destroyed by the defendant, with interest on such sum at 6% from such date until the time of the finding of your verdict. When I said that the destruction of the land must be the direct effect of the defendant's acts in the particulars I stated, it is meant that the defendant's acts must have been the proximate cause, the direct and immediate cause of the destruction of the land. If the cause of the destruction was the usual or unusual action of the river itself, independent of the numbered dikes, or if such cause was a change in the course of the river above these numbered dikes, or if the destruction was the result of building of the dikes or revetments above these numbered dikes, then the plaintiffs are not entitled to recover for any acts of the defendant in the construction of these numbered dikes. If the Missouri River, by reason of its volume and because of the course it was given above these numbered dikes caused the washing away of the plaintiffs' lands and dikes did not really—that is, the numbered dikes—did not really and directly cause the destruction by diverting the water, then the defendant would not be responsible in this action. In other words, if the destruction would have been done even if these dikes had not been built, then the plaintiff could not recover for such destruction. As to the washing done by boats referred to as paddle washing, if you find that because of such washing done by defendant some of the plaintiffs' lands were permanently washed away and destroyed, then the plaintiffs would be entitled to recover for two-thirds of the fair and reasonable cash market value of such land as was so destroyed, if it was destroyed as the direct and immediate effect of such washing.

There is some evidence as I recall, as to the amount of such destruction. Mr. Yearsley was asked a question on cross-examination; "All right, how many acres of land was washed into the river by the Judge Ross and the other two diesel boats and immediately following was another question, limited first to the boats. Answer. "Well, the boats really washed—done half the damage—done—washed half the land." Question: "About how many acres would that be?" Answer: "Twenty-five or thirty." I do not undertake to say that that is all the evidence on the subject of [fol. 157] land claimed to have been destroyed by the washing by the use of boats but if you determine that the plaintiffs are entitled to recover for lands destroyed by the paddle boats, then you should allow for the land so destroyed as I have said, two-thirds of the fair and reasonable cash market value of such lands so destroyed at the time of their destruction.

A special verdict will be given to you by which you are to answer as to whether in case you find in favor of the plaintiffs you find that the destruction was because of the use of the paddle boats, and if so the number of acres so destroyed; or by reason of the construction of the dikes, and if so the number of acres so destroyed; or if by both the paddle boats and the dikes you find that the acreage was destroyed, the total number of acres that you find was destroyed in that way. If the washing was not the direct and immediate cause of the plaintiffs' land falling in the river then the defendants could not be charged with the loss of that land. The fact that the defendant had contracts with the United States, which have been referred to as Exhibits 9 and 10 in this case, to do the work specified therein, and the fact that it followed the plans and specifications as to the work which were furnished by the United States Engineers in charge, and the fact that the work was approved by the government officers in charge would not be a defense in this action. Neither would the fact that the dikes were located where they were and constructed as they were according to the plans and specifications and orders of the United States Engineers and according to the contracts that they had entered into.

If you find that the plaintiffs are not entitled to recover, then you will use the form of verdict which so declares.

If you find that the plaintiffs are entitled to recover, then you will ascertain the amount which the plaintiffs are entitled to, and you will write that amount into your verdict.

The burden of proof in this case is upon the plaintiffs to prove by a preponderance of the evidence that some of the land in question was destroyed, as I have heretofore stated. That it was destroyed by the defendant, as I have heretofore stated, and the amount of land so destroyed, and to prove the fair and reasonable cash market value of the land so destroyed. Where a party to a case has the burden of proving a fact by a preponderance of the evidence he must prove the fact by evidence which has more weight, is more convincing in the minds of the jurors than the evidence which is opposed to it. If the evidence is evenly balanced as to such fact, or preponderates against such a fact, then the fact is not proved by a preponderance of the evidence.

In weighing the testimony of the witnesses the jury has the right to consider the means that they have to observe, to remember and to relate what they testify about. You have the right to consider any interest which a witness may have in the result of the suit in which he testifies, and you may consider the conduct and demeanor of any witness while testifying. You have the right to consider the testimony of any witness in view of the testimony of other witnesses, in view of any facts and circumstances proved upon the trial, but you gentlemen of the jury are the sole judges of the facts and the sole judges of the testimony, both as to what the testimony was and what value and weight it may have.

I have given you my recollection as to some of the evidence, as I have a right to do, but you will be guided solely by your own recollection of the evidence.

[fol. 158] Now, you have taken an oath to decide the case according to the evidence, and under the instructions of the court. This imposes upon you the duty to disregard who the parties are, to not be influenced by any considerations of sympathy, of personal like or dislike of any parties, not to be influenced by any general considerations as to what you think ought to have been done, or ought now be done, or what ought to be done in the future, or what

ought to be the general conduct of public affairs, or any matters except just what the evidence in the case is and what it proves or does not prove with reference to the issues of the case.

The exhibits in the case which have been admitted will be for your consideration if you desire to see them.

When you go to the jury room you will select a foreman. When you have agreed upon a verdict your foreman will sign it, and when you return into court with the verdict so signed it will be the declaration that that is your official action.

If you reach a verdict during the afternoon we will be here to receive it.

You will be allowed to separate while you are deliberating on the case.

You may wish to take your lunch before beginning consideration of the case, but after lunch you will return to the jury room and begin your deliberations, if that is your choice. If you shouldn't reach a verdict by your supper time you can adjourn, and owing to the fact that some of the jurors wish to be present at the graduation of children tonight the jury may adjourn at such time as you think is reasonable, 5 o'clock, or 4:30, or 5:30, whatever is suitable if you haven't agreed, and come back tomorrow morning, say 9:30 or nine, earlier if you wish, and deliberate further; and if you don't reach a verdict by tomorrow noon, why then you may separate for your meal and come back again, and continue through the afternoon; if you shouldn't agree at night you can separate for supper and come back after supper and deliberate further, and adjourn at a reasonable hour, say 9, 9:30 or 10; that will be Saturday night, and come back Sunday morning and continue to so deliberate with such adjournments until such time as you have agreed, or until such time as the court thinks you shouldn't be required to deliberate further.

It is the hope that you will agree upon a verdict if you reasonably can. Trials are often expensive, witnesses may die and memories may not be as good later on as now,

and another jury may not have any better opportunity than you have deciding upon the facts that you now have. So that if you reasonably can under your oaths decide this case on the present issues in evidence, that will be a welcomed result; but of course your highest obligation is to your oath, which is to decide it according to the law and the evidence as the evidence appears to you.

Now, the attorneys have a right to except to the instructions in order to preserve their rights in an appellate court, and so that they may talk freely I will excuse you out into the hall for a short period. Sometimes, as a result of the exceptions, I may want to modify the instructions before finally submitting the case to you. You will therefore be recalled before the case is finally submitted after I have met with the attorneys.

I have marked each of the instructions tendered by the defendants as refused and noted an exception.

Now, are there any further exceptions?"

The jury was thereupon excused and in the absence of the jury the following proceedings were had:

[fol. 159] "Mr. Van Pelt: Show on behalf of the plaintiff an exception to that instruction in which you took from the jury the question of tree damage, or damage to trees; and we would separately except to the instruction in which you took from the jury the damage to blue grass pasture by reason of the flood in 1937; and we would except to that part of the instructions in which the court limited the matter of the damage to plaintiffs' land to certain dikes specifically enumerated in the instructions, and request that the court instruct the jury that if any dikes built by the defendant construction company on the Iowa or Nebraska shores and south of Nebraska City and north of the numbered dikes set forth in the instructions caused damage to plaintiffs that the jury can consider the construction of those dikes in determining their verdict herein; and we further except to the part of a later instruction in which the court stated that any damage to plaintiffs' lands by reason of dikes to the north of the numbered dikes would bar a recovery on behalf of plaintiff, and submit that any dikes constructed by the defendant construction company

south of Nebraska City on the Iowa and Nebraska shore and north of the south line of the Yearsley land could be considered by the jury if those dikes directly, as enumerated in the instructions, caused damage to the plaintiffs.

Mr. Rogers: The defendant respectfully excepts to that portion of the charge in general terms as follows:

That if the jury find that by the direct effect of the building of the dikes, the given numbers 602.7 and the trail dike 602.7-A, 601.9 or any one of them, or washing by paddle boats, or as a direct effect of the washing and the building of the dikes combined the water of the Missouri river was forced against the land and washed away the land of the plaintiffs and the land was thereby lost and destroyed the plaintiffs would be entitled to recover two-thirds of the fair and reasonable cash market value with interest on the same.

The defendant further excepts to that portion of the charge which in effect told the jury that if the plaintiffs' lands were washed away by the boats that the plaintiffs would be entitled to recover two-thirds of the fair and reasonable cash market value of the same; and the defendant further excepts to that portion of the charge to the effect that the fact that the defendant had a contract or contracts with the United States government for the doing of the work and followed plans and specifications and work orders issued by the United States Government, in the doing of the work, and the fact that the work was done according to the plans and specifications and work orders, and was approved by the Engineers Department or the government, or the fact that the dikes were located according to the plans and specifications would constitute no defense whatever to the action of the plaintiffs.

That is all of the exceptions of the defendant as to the charge.

The Court: Call the jury.

Gentlemen, of the Jury, the instructions that I gave you will stand as the instructions of the Court.

The forms of verdict will be given to you, and the form of the special verdict; when you come back after lunch those will be ready for you."

Whereupon said trial recessed until 1:30 p. m. of said day, at which time the jury and parties returned into court, and the following proceedings were had:

[fol. 160] "The Court: Gentlemen of the Jury:

There are two forms of verdict, one saying you find in favor of the defendant and the other one reads as follows, after the title: We, the jury in the above entitled cause, find in favor of the plaintiffs herein and against the defendant, Ross Construction Company, and assess the plaintiffs' damages at the sum of $.....

(1) How much of above amount does the jury allow because of destruction caused to the plaintiffs' land by reason of the use of defendant's paddle boats? $.....

(2) How much of the above amount does the jury allow by reason of the construction of the three dikes, as mentioned in the instructions? $.....

(3) Is the jury unable to separately state the amounts allowed under questions one and two? .....

Dated:

The purpose of this verdict is this; the first amount is what you assess if you find in favor of the plaintiffs as the total damages due the plaintiffs. The question then is how much of the above amount does the jury allow because of the destruction of plaintiffs' land by use of the boats and by reason of the dikes.

I wish the jury to answer those questions if they are able. The two sums added together should equal the sum you allow, first, as the total damages. But you might find that there was nothing due under question one or nothing due under question two. For instance, purely as an illustration, if you were allowing—I will say $100—I could just as well use $1,000 or $5,000 or $500,000—for mathematical purposes. If you were to allow $100 as the total damages, then you were to allow say $50 under one and $50 under two, that would add up and make a total of $100 and that would be correct. Or if you allow thirty and seventy, or seventy and thirty, or if you allow nothing under one of these then the total amount of say $100 in the verdict above should be the amount you find when ong and two are

added up. $100 for one and nothing for the other make a total of $100.

If you are unable to determine the amounts that you find the plaintiffs are entitled to under these separate questions, 1 and 2, still you may return a verdict for the total amount but in that case you should state in question three, which asks you if you are unable to find separate amounts—just say "Yes".

In other words the special questions given to you are with the hope that you will be able to aid us in that way if you can.

The instructions that I gave to you, or am giving you now—it might be an hour before they are completed. If you think you would like to have them they will be available just as given and if you wish them.

Well then, Gentlemen, the case is submitted to you under the instructions and forms of verdict. And the exhibits, if you find you need them—you may not need them—in the decision; if you do you may specify what exhibits you think you need either particularly or generally, and we will see that those exhibits are available for you.

You can go, then, in charge of the bailiff."

Whereupon the jury retired to consider their verdict and on May 28, 1938 the jury returned into Court with the following verdict:

"We, the jury in the above entitled cause, find in favor of the plaintiffs therein and against the defendant, Ross Construction Company, and assess the plaintiffs damages at the sum of Eight Hundred Six & no/100 Dollars.

[fol. 161] 1. How much of above amount does the jury allow because of destruction of plaintiffs' land by use of defendant's paddle boats? $.....

2. How much of above amount does the jury allow because of destruction of plaintiffs' land by reason of defendant's construction of the three dikes numbered as mentioned in the instructions? $.....

3. Is the jury unable to separately state the amounts allowed under questions 1 and 2? Yes.

Dated this 28th day of May, 1938.

LEO GORMAN, Foreman."

Thereafter on June 6, 1938 judgment was entered by the Court on said verdict in favor of plaintiffs and against the defendant, W. A. Ross Construction Company, for the sum of $806.00 and the costs of said action.

* * * * * *

(Approval of Bill of Exceptions by District Judge and Counsel for Plaintiffs.)

The above and foregoing Bill of Exceptions sets forth, in narrative form, all of the evidence, material and necessary to present clearly the questions of law involved in the rulings, to which exceptions are saved, and a proper understanding of the questions presented by this record, together with all of the offers, exhibits, objections, and exceptions thereto that are material and necessary on this appeal; and the motions for directed verdict made by defendant, W. A. Ross Construction Company, at the conclusion of plaintiffs' evidence and at the conclusion of all the evidence, and the Court's ruling thereon; and the instructions to the jury requested by the defendant, W. A. Ross Construction Company, and the Court's ruling thereon; and the whole of the Court's charge to the jury and the exceptions thereto; and each and every matter contained in said Bill of Exceptions is true and correct and the same is hereby signed, sealed and certified to be allowed as a full, true and complete Bill of Exceptions for defendant, W. A. Ross Construction Company, in and for said cause, and it is hereby ordered that the same may be filed and made a part of the record in this cause as of the date of Oct. 15, 1938, the same being within the time duly allowed therefor.

THOS. C. MUNGER,
Judge of the United States District Court, Presiding at the Trial of said Cause.

We have examined defendant's foregoing Bill of Exceptions and find the same to be true and correct in all respects and consent that it be settled and allowed by the Court as the Bill of Exceptions on appeal in said cause.

W. L. DWYER,
ROBERT VAN PELT,
Attorneys for Plaintiffs.

[fol. 162] (Clerk's Certificate to Transcript.)

United States of America,
District of Nebraska,
Lincoln Division—ss.

I, R. C. Hoyt, Clerk of the District Court of the United States in and for the District of Nebraska, hereby certify that pursuant to the order allowing appeal, and in compliance with the praecipe, and supplemental praecipe, copies of which are found on pages three and five, respectively, hereof, the foregoing record has been made, and that same is a true and faithful transcript of the pleadings and proceedings on file and of record in said court, as indicated in the foregoing index, in the case of Lawrence Yearsley and George Yearsley, Plaintiffs and Appellees, versus W. A. Ross Construction Company, a Corporation, Defendant and Appellant, No. 1065 Law.

I further certify that a copy of the Citation, duly certified, has been lodged and remains in my office as such clerk.

Witness my hand and the Seal of said Court at Lincoln, in said District, this 27th day of October, 1938.

(Seal)
U. S. Dist. Court
Dist. of Nebr.
Lincoln Div.

R. C. HOYT, Clerk,
By E. B. Panter,
Deputy.

Filed Nov. 5, 1938. E. E. Koch, Clerk.

[fol. 179] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

W. A. Ross Construction Company, Appellant,
No. 11,353. vs.
Lawrence Yearsley, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

CLAY C. ROGERS,
904 Bryant Bldg.,
Kansas City, Missouri.

PAUL JESSEN,
Nebraska City, Nebraska.

JOHN M. DIERKS,
Nebraska City, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 5, 1938.

(Appearance of Mr. Robert Van Pelt as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

ROBERT VAN PELT.

(Endorsed): Filed in U. S. Circuit Court of Appeals Nov. 9, 1938.

[fol. 180] (Appearance of Messrs. Dwyer & Dwyer as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

D. W. DWYER,

W. L. DWYER.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 12, 1938.

(Order of Submission.)

March Term, 1939.

Tuesday, March 21, 1939.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Clay C. Rogers and continued by Mr. John M. Dierks for appellant, continued by Mr. Robert Van Pelt for appellee Lawrence Yearsley, and concluded by Mr. John M. Dierks for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 181] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,353.—May Term, A. D. 1939.

W. A. Ross Construction Company, a corporation, Appellant,
vs.
Lawrence Yearsley and George Yearsley, Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

[May 10, 1939.]

Mr. Clay C. Rogers and Mr. John M. Dierks (Mr. Paul Jessen, Mr. O. C. Mosman and Mr. C. Jasper Bell were with them on the brief) for Appellant.

Mr. Robert Van Pelt (Messrs. Dwyer & Dwyer and Messrs. Perry, Van Pelt & Marti were on the brief) for Appellee Lawrence Yearsley.

Before Sanborn, Thomas, and Van Valkenburgh, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the Court.

This is an action at law brought by Lawrence Yearsley and George Yearsley, who were the owners of an undivided two-thirds interest in a 250-acre farm and its accretions bordering upon the Missouri River in Otoe County, Nebraska, against the appellant, W. A. Ross Construction Company (hereinafter referred to as the contractor), —which had, under a contract with the United States, constructed dikes in the Missouri River for the purpose of improving navigation,—to recover damages due to the erosion of the plaintiffs' "accretion land" caused by the deflecting of the current of the river against it by the dikes and by the wash from the paddle wheels of the appellant's steamboats. The owner of the other undivided one-third interest in the land refused to join the Yearsleys as a plaintiff in the action, and was therefore made a defendant. Issues were joined; the case was tried to a jury; and from a judgment for $806.00 against the contractor entered upon a verdict for the plaintiffs, this appeal was taken.

In their amended petition, filed in December, 1937, the plaintiffs alleged, in substance, that they were the owners of an undivided two-thirds of the land in suit; that for a period of about three years, the contractor had been engaged in construction work on the Missouri River, changing its course; that it had built dikes in the river and had used large boats with paddles and pumps to wash away land along its banks, and, in so doing, had washed away 100 acres, more or less, of good pasture and farm land belonging to the plaintiffs, which was worth $50.00 an acre; that during the month of July, 1937, by reason of the dikes built by the contractor in close proximity to the plaintiffs' land, the waters of the river were cast upon their land, completely destroying the blue grass thereon and impairing the value of the land; that, in addition, the contractor had cut trees and brush growing upon it; all to the plaintiffs' damage in the sum of $8,000, for which judgment was prayed.

The contractor, in its answer, admitted the plaintiffs' interest in the land in suit; admitted that it had done construction work and built dikes in the Missouri River for more than three years; but denied that it had, by such construction work, washed away any part of the plaintiffs' land, produced artificial erosion, or changed the course of the river, except to confine it between stabilized bank lines as set and defined by the Government Engineers in charge of this work for the Government of the United States. It denied any trespassing, tree cutting, or flooding of the plaintiffs' land. It as-

serted that all of the construction work which it had performed and of which the plaintiffs complained had been performed under written contracts with the Government and under the directions of the Secretary of War and the supervision of the Chief of Engineers of the United States, for the purpose of improving the navigation of the Missouri River as authorized by an Act of Congress, and that the construction work so performed by the contractor was a part of the plan of the Government to establish a permanent navigable six-foot channel in the Missouri River; and that if the construction of the dikes by the contractor for the Government, in aid of navigation, had injured the plaintiffs' land, the injury was not of a character which entitled the plaintiffs to compensation or damages.

The plaintiffs in their reply admitted that the contractor was operating under a Government contract, and alleged that the contract did not contemplate the taking of their land without just compensation and due process of law, and that the contractor's acts resulting in the destruction of a part of their land was a violation of their rights under the Fifth Amendment to the Constitution of the United States prohibiting the taking of private property for public use without just compensation.

Upon the trial, the evidence failed to sustain the claim of the plaintiffs that the contractor was responsible for the cutting of trees or for the flooding of the lands in suit. The evidence established that two dikes built in the river above, and one dike built opposite, their land had diverted the channel or the current of the river from the Iowa shore to the Nebraska shore, and that, as a result, the "accretion land" of the plaintiffs to the extent of perhaps 95 acres had been eroded and carried away. There was also evidence tending to show that in extending the dike opposite the plaintiffs' land from the Iowa shore toward the Nebraska shore, the contractor, apparently to keep open an adequate channel for navigation between the end of the dike and the shore, accelerated the erosion of the plaintiffs' land by using the paddle wheels of its steamboats to increase the action of the current. There was no evidence, however, to show that this "paddle washing" had done anything more than hasten the inevitable. It was undisputed that the work which the contractor had done in the river bed was all authorized and directed by the Government of the United States for the purpose of improving the navigation of this navigable river.

The plaintiffs were entitled to maintain this action against the contractor alone, even though the construction work complained of

was done under the authority and direction of the United States. The rule is that an officer or agent of the United States may be sued where he has exceeded his authority or acted under an authority not validly conferred; and the exemption of the United States from liability for tort does not protect its officers or agents from personal liability to persons whose rights of property have been wrongfully invaded by them. *Little* v. *Barreme*, 2 *Cranch*, 170, 178; *United States* v. *Lee*, 106 U. S. 196, 220-221; *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, 171-172; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Tindal* v. *Wesley*, 167 U. S. 204, 214-215, 222-223; *Scranton* v. *Wheeler*, 179 U. S. 141, 152; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *Goltra* v. *Weeks*, 271 U. S. 536, 545; *Ickes* v. *Fox*, 300 U. S. 82, 97. There was no lack of valid authority and no wrongful invasion of the plaintiffs' property rights unless the construction of these dikes by the contractor constituted a taking or appropriation of so much of the plaintiffs' land as was washed away as a result of the diversion of the current by the dikes.

It is apparent that the vital question in this case is whether the building of the dikes in the Missouri River which diverted the current, which, after its diversion, eroded the plaintiffs' land, constituted an appropriation or taking of property for which compensation should be made, or whether the loss suffered by the plaintiffs was "merely a consequential damage incident to a public undertaking which must be borne without any right to compensation." (*Peabody* v. *United States*, 231 U. S. 530, 538.)

The District Court was of the opinion that the plaintiffs were entitled to recover for such loss and damage caused by the erosion of their lands as was directly attributable to, and was proximately caused by, either the dikes constructed by the contractor or the wash from the paddle wheels of the contractor's boats; and submitted the case to the jury upon that theory. The jury's verdict amounted to a finding that the value of the plaintiffs' undivided two-thirds interest in the land eroded by the river and by the "paddle washing" was $806.00 and that the erosion was proximately caused by the dikes and by "paddle washing".

The authorities upon which the plaintiffs rely to sustain their judgment are those dealing with the right to recover compensation for lands affected by overflow from the building of dams in navigable streams.[1]

[1] *Pumpelly* v. *Green Bay Co.*, 80 U. S. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *C. B. & Q. R. Co.*, 8 Cir., 82 F. (2d) 131; *United States* v. *C. B. & Q. R. Co.*, 7 Cir., 90 F. (2d) 161.

"It is clear * * * that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment." *United States* v. *Lynah*, 188 U. S. 445, 470. See, also, *United States* v. *Cress*, 243 U. S. 316.

We think that it is equally clear that when the United States, in aid of navigation, builds structures in the bed of a navigable river, which merely cause a diversion of the current or shifting of the channel, it does not thereby directly invade, appropriate or take riparian lands eroded as a result of the diversion of the current, and that the damage caused is a consequential one incident to a public undertaking, which must be borne without right to compensation. This is so for the reason that an act done in the proper exercise of the power of the government over the improvement of navigable rivers, which does not directly encroach upon private property, though its consequences may impair the use of such property, is not a taking within the meaning of the Fifth Amendment, and riparian ownership on navigable waters is subject to the obligation to suffer the consequences of an improvement of navigation by the United States in the exercise of its dominant right in that regard. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *Gibson* v. *United States*, 166 U. S. 269, 275; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *Bedford* v. *United States*, 192 U. S. 217, 225; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 70, 72; *Jackson* v. *United States*, 230 U. S. 1, 23; *Hughes* v. *United States*, 230 U. S. 24, 32-34; *United States* v. *Archer*, 241 U. S. 119, 148; *United States* v. *Cress*, 243 U. S. 316, 327; *John Horstmann Co.* v. *United States*, 257 U. S. 138, 145-146; *Sanguinetti* v. *United States*, 264 U. S. 146, 150; *Franklin* v. *United States*, 6 Cir., 101 F. (2d) 459, 461-463.

In the case last cited the plaintiffs had alleged in their complaint that dikes similar to those here involved had been constructed by the United States in the Mississippi River above and opposite 1100 acres of fertile farm lands on the Tennessee side of the river, in which lands each of them had an undivided one-fourth interest; that the purpose and effect of the construction of these dikes was to force the current of the river away from its natural course on the Arkansas side, across the river and against the bank on the Tennessee side, in order to improve navigation, with the result that within one year after the completion of the dikes all but a few acres of their lands were washed away; that the destruction of

these lands was the direct and proximate result of the construction of the dikes; that the destruction was inevitable and that the government and its agents knew that it would occur; and that the construction of the dikes constituted the taking of their lands within the meaning of the Fifth Amendment to the Constitution of the United States. The lower court sustained a demurrer to their complaint, and entered a judgment of dismissal, which was affirmed on appeal. Judge Allen, who delivered the opinion of the Court of Appeals, after discussing the authorities bearing upon the question, said (p. 463 of 101 F. [2d]):

"In the instant case appellants urge that since the alleged purpose in constructing the dike was to change the current of the river, a direct invasion results. They contend that the riparian owner has a right to have the river come to him unchanged in its natural condition. This is their right as against individual riparian owners (*United States* v. *Chandler-Dunbar Water Power Co., supra*, [229 U. S.] at page 70, 33 S. Ct. 667; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351, 366, 36 S. Ct. 671, 60 L. Ed. 1041), but not as against the paramount power of the United States to improve navigation. *United States* v. *Chandler-Dunbar Water Power Co.*, at page 70, 33 S. Ct. 667; *Cubbins* v. *Mississippi River Commission*, at page 369, 36 S. Ct. 671; *Hughes* v. *United States*, 230 U. S. 24, 33 S. Ct. 1019, 57 L. Ed. 1374, 46 L. R. A., N. S., 624. The power of Congress extends to the whole expanse of the stream. *Greenleaf-Johnson Lumber Co.* v. *Garrison, Secretary of War*, 237 U. S. 251, 263, 35 S. Ct. 551, 59 L. Ed. 939. The United States is not responsible to riparian owners for consequential damages from the deflection of waters by reason of structures lawfully constructed in aid of navigation."

We are in complete accord with the conclusion reached in that case and the reasoning upon which it is based. No useful purpose would be served by restating what has been so well expressed.

The plaintiffs believe that this case may be distinguished from the Franklin case because the erosion here was accelerated by the wash from the paddle wheels of the contractor's steamboats. The fact that the inevitable washing away of the plaintiffs' land by the current was somewhat hastened by artificial means, we think, is of no help to the plaintiffs. The evidence did not show that this "paddle washing" had enhanced the plaintiffs' injury or had eroded land which was not already doomed to destruction. In any event, it is impossible to ascertain how much of the erosion was caused by "paddle washing".

It is our conclusion that the District Court erred in failing, at the close of the evidence, to direct a verdict in favor of the contractor.

The judgment is reversed and the case remanded for further proceedings not inconsistent herewith.

[fol. 188] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Wednesday, May 10, 1939.

W. A. Ross Construction Company, a corporation, Appellant,

No. 11,353. vs.

Lawrence Yearsley and George Yearsley.

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the W. A. Ross Construction Company, a corporation, have and recover against Lawrence Yearsley and George Yearsley the sum of .... Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion filed herein.

May 10, 1939.

[fol. 189] (Petition of Appellees for a Rehearing.)

Appellees respectfully move the court to grant a rehearing in the above entitled case and to vacate and set aside the opinion, judgment and order of the court entered May 10, 1939 upon the following grounds:

(1) The opinion, judgment and order of the court results in a taking of appellees' property without just compensation, in violation of the Fifth Amendment to the United States Constitution.

(2) The reasoning on which said opinion and decision is based is erroneous.

(3) The taking of appellees' property as shown by the record in this case was not consequential.

(4) The court erred in failing to affirm the judgment and order of the trial court based upon the verdict of the jury.

(5) This court erred in holding that a verdict should have been directed for appellant at the close of all of the evidence in this case.

(6) A petition for writ of certiorari to the United States Supreme Court has been granted by the United States Supreme Court in the case of Franklin vs. United States, 101 Fed. (2d) 459, recently decided by the Sixth Circuit Court of Appeals, and upon which the decision of this court reversing the trial court is based.

Respectfully submitted,

L. W. DW''ER,

ROBERT VAN PELT,

Attorneys for Appellees.

[fol. 190] The undersigned, Robert Van Pelt, hereby certifies that the above and foregoing petition for rehearing is filed in good faith and is believed to be meritorious and is not made for the purpose of delay.

ROBERT VAN PELT,

Counsel for Appellees.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 22, 1939.

(Order Denying Petition for Rehearing.)

May Term, 1939.

Friday, June 2, 1939.

The petition for rehearing filed by counsel for appellees in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

June 2, 1939.

(Motion of Appellee Lawrence Yearsley for Stay of Mandate.)

Lawrence Yearsley, appellee, respectfully moves the court to stay the issuance of a mandate in this cause for a period of 30 days pending an application to the Supreme Court for certiorari herein, and in event said petition for certiorari, record and brief is filed in the Supreme Court of the United States, that said stay shall continue until final disposition by the Supreme Court of this cause, and shows to the court:

(1) That appellee plans, intends and will file a petition for certiorari from the judgment of this court and opinion of May 10, 1939 and the order of June 2, 1939 denying the petition of appellee for rehearing.

[fol. 191] (2) That a petition for writ of certiorari has been granted by the Supreme Court of the United States in the case of Franklin vs. United States, on which the decision in this case is based.

LAWRENCE YEARSLEY,
Appellee.

By W. L. Dwyer,
Robert Van Pelt,
His Attorneys.

(Endorsed): Filed in U. S. Circuit Court of Appeals. Jun. 8, 1939.

(Order Staying Issuance of Mandate.)

May Term, 1939.

Monday, June 12, 1939.

On consideration of the motion of appellee Lawrence Yearsley for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 12, 1939.

[fol. 192] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the W. A. Ross Construction Company, a corporation, was Appellant, and Lawrence Yearsley and George Yearsley were Appellees, No. 11353, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of June, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 72.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.